Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHAMPLIN PETROLEUM COMPANY,
Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 16, 1981

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QUESTIONS PRESENTED

1. In deciding, as a matter of law, in the face of an avalanche of evidence to the contrary, that plaintiffs had established the fraudulent concealment exception to the statute of limitations, the trial judge took for himself an issue on which petitioner had a right under the Seventh Amendment to a jury trial. He did so without reason or explanation. In so doing he departed from the previous uniform practice in the Federal Courts of submitting this issue to the jury. The question is whether the district court's action so far departed from the accepted and usual course of judicial proceedings that this Court should intervene and grant summary relief.

2. In awarding post-judgment interest on an attorneys' fee award under the Clayton Act, the decision below conflicts squarely with the law of the Fifth Circuit. *Carpa, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978). The right to interest on attorneys' fee awards under the Clayton Act arises in hundreds of cases every year in the federal courts. It involves a point of federal statutory law which should be uniform throughout the federal system. The question is whether the Court should grant the writ and resolve the conflict, summarily or otherwise.

PARTIES

Champlin Petroleum Company appeared as appellant before the United States Court of Appeals for the Tenth Circuit; King & King Enterprises and Carl R. King, both doing business as King Gas & Oil, appeared as appellees.*

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* In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, Champlin states that Union Pacific Corporation is the parent of Champlin Petroleum Company. Champlin Petroleum Company and Union Pacific Corporation have no further parent, subsidiary, or affiliate companies to report. King & King Enterprises has no parent, subsidiary, or affiliate companies.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Champlin Petroleum Company ("Champlin") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered October 15, 1981.

OPINIONS BELOW

The mandate of the Court of Appeals for the Tenth Circuit, which contains that court's order regarding interest on attorney fees, is reproduced in Appendix A. The opinion of the Court of Appeals for the Tenth Circuit is reproduced in Appendix B and is reported at 657 F.2d 1147. Portions of the proceedings before the United States District Court for the Eastern District of Oklahoma are reproduced in Appendix C.

JURISDICTION

The Court of Appeals for the Tenth Circuit denied Champlin's petition for a rehearing on September 15, 1981. The amended judgment of the Court of Appeals for the Tenth Circuit was entered October 15, 1981. This petition was filed November 16, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Seventh Amendment, which reads, in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

U.S. Const. amend. VII.

The statutes involved are 15 U.S.C. § 15 (1976), 15 U.S.C. § 15b (1976), and 28 U.S.C. § 1961 (1976), which read, in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. § 15.

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. 15 U.S.C. § 15b.

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law. 28 U.S.C. § 1961.

STATEMENT OF THE CASE

Introduction

In order to avoid having a substantial portion of its damages barred by the statute of limitations, the plaintiff below had the burden of proving, *among other things*, that it did not know, prior to October 2, 1971, and could not with due diligence have learned, of the facts on which its cause of action was based. In the face of an avalanche of evidence from the mouths of plaintiff's own witnesses that it knew of its cause of action in 1969 and earlier, the trial judge took the issue away from the jury, decided it himself in plaintiff's favor, and thereby deprived petitioner Champlin of its jury trial right under the Seventh Amendment. For reasons spelled out below, at 16-28, this error is not of a type which may appropriately be overlooked in this Court's exercise of its certiorari jurisdiction.

1. *Procedural History*

King and King Enterprises and Carl R. King, both doing business as King Gas & Oil ("King"), brought an action in the United States District Court for the Eastern District of Oklahoma, on October 2, 1975, against petitioner Champlin Petroleum Company ("Champlin"). The Complaint alleged, *inter alia*, that Champlin had conspired with its competitors to fix prices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and sought treble damages under the Clayton Act, 15 U.S.C. § 15 (1976).[1]

King entered the gasoline retail business in Oklahoma in 1966 and thereafter operated a series of service stations in Oklahoma, Arkansas, and Texas. As a relatively small company, King sought to undersell larger inte-

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[1] The District Court's original jurisdiction was based on 15 U.S.C. §§ 15 & 26 and 28 U.S.C. § 1337 (1976).

grated companies such as Champlin by from two to five cents per gallon. The difference of two to five cents between King's price and that of other retailers is referred to by King as a "spot." King's theory of the case was that larger integrated companies, including Champlin, had sought by concerted conduct to force King to eliminate his spot. King claimed that they threatened to cut their prices to the point that King had either to lose business or reduce his price and sell gasoline at a loss. King claimed that when he refused to eliminate the spot, they carried out their threat, took the price "to the bottom," and forced King to sell gasoline at a loss. Then, according to King, when they felt he had suffered enough and might be willing to cooperate, they agreed with each other to restore the market to its former price levels. He claimed that when they restored the market to its former price levels, they coerced King to go along with the conspiracy and raise his prices too, eliminating his spot in the process.

King supported his case at trial through testimony by a disgruntled former employee of Champlin named Dea Entriken, by testimony from King's employee Sam Olson, who was in charge of pricing for King, by testimony from the King brothers themselves, Carl and Fred, and through other corroborative evidence. According to these witnesses, the conspiracy began at least as early as 1967. Entriken, his predecessor at Champlin, and other conspirators, would telephone Olson or one of the Kings, purporting to represent the other conspirators. They would threaten to take the price to the bottom if King did not eliminate his spot; and they would endeavor to persuade him to go along with an agreed-upon price rise. According to their testimony, prices almost invariably rose in tandem to the level Entriken had predicted.

King claimed that he was injured both when he had to reduce his prices and when he was coerced into raising his prices above his normal and desirable spot. An ac-

countant employed by King as an expert witness[2] testified that King's gas stations lost profits both when his prices were forced down and when they were forced up over his "optimum" pricing level.[3]

The jury returned a verdict for King.[4] The Court of Appeals sustained the verdict and damages of $453,590.[5] After trebling in accordance with 15 U.S.C. § 15, the final award, excluding attorneys' fees and costs, was $1,360,770. Apps. B & D. The trial judge also ordered Champlin to pay King an attorney fee of $553,281.31 and costs of $15,762.82. App. E.

2. *The Statute of Limitations*

In its answer to the complaint, Champlin alleged that much of King's claim for damages was barred by the statute of limitations. The statute of limitations for private antitrust damage actions such as this one is four

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[2] This same witness's testimony had been rejected by *three* different Courts of Appeals prior to his testimony in this case. *Gray* v. *Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973); *Joseph E. Seagram & Sons* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 85-88 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Continental Baking Co.* v. *Utah Pie Co.*, 396 F.2d 161, 178-9, 191, 195 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968).

[3] King's expert witness concluded (1) that King's existing gas stations had lost $270,919 from January 1, 1970, through March 31, 1973, as a result of the conspiracy; (2) that but for the conspiracy King would have opened six additional stations and made $302,352; and (3) that King closed four stations as a result of the conspiracy, thus losing $182,641. According to that witness, the damages totalled $755,912 before trebling.

[4] The jury originally awarded damages in the amount of $1,205,942—$450,000 more than King had asked for. The trial judge reduced the award to $755,942, the full amount asked for. App. F.

[5] The Court of Apeals reduced the award by $302,352 to $453,590. The Court of Appeals held that the damages attributable to the profits from stations which the accountant had assumed might have been, but never were, opened were too speculative.

years. 15 U.S.C. § 15b (1976). Since this action was filed on October 2, 1975, all damages incurred before October 2, 1971, would ordinarily be barred. Of the amount eventually recovered, $256,689 ($770,067 after trebling) were suffered, according to the calculations presented by King's accountant, more than four years prior to the filing of the complaint.[6] It was undisputed, therefore, that $770,067 of King's claim was barred by the statute of limitations, unless King could establish that he fell within some exception to it. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971).

The only exception offered by King was the so-called "fraudulent concealment" exception. Under this exception King would be excused for waiting over six years before filing suit if he could prove (1) that he did not know of the facts giving rise to his cause of action, (2) that he could not by exercise of due diligence have learned of them, and (3) that Champlin had actively concealed them by fraudulent means. These elements of the fraudulent concealment exception were described in an opinion in this case addressing a fourth-party complaint not here relevant, *King & King Enterprises* v. *Champlin Petroleum Co.*, 446 F. Supp. 906, 911 (E.D. Okla. 1978)[7]; they are set forth in the opinion of the Court of Appeals below, 657 F.2d 1147, 1154 (App. B, 16a); and there is no dispute among the parties that these are the applicable elements of the fraudulent concealment exception.

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[6] $105,513 of the damages attributable to lost profits by existing stations related to the period prior to October 2, 1971. $151,176 of the damages attributable to closed stations related to stations closed in 1969. Appendix G contains excerpts from the trial proceedings and defendant's proposed exhibit 19 which would allow this Court to determine which damages are barred by the statute of limitations. *See also* App. H, 181a-182a.

[7] This opinion was issued by Judge Morris, who was not the judge who presided at trial.

It was not possible for King, consistent with his theory of the case, to establish that *he* did not know as early as 1969 of the facts constituting the basis for his cause of action. It was an inextricable part of King's theory of the case and an integral part of the testimony of Olson, the King brothers, and Entriken that King necessarily knew of the conspiracy from its inception. The entire theory of the case was that the conspirators tried to persuade King to join the conspiracy and then threatened and punished him for refusing. Indeed, the jury could only have found the fraudulent concealment exception to the statute of limitations to have been established if it disbelieved *King's* own witnesses.

It is thus inescapable that if the issue of the fraudulent concealment exception to the statute of limitations had been submitted to the jury, it would have found in favor of Champlin. However, the jury never had the opportunity to do so because, without any explanation, the trial judge refused to submit the issue to the jury and decided it in King's favor himself.

The record is so full of proof, from King's own witnesses, that King knew of the alleged price-fixing conspiracy prior to October 2, 1971, that it would be senseless to include them all in this petition. They are reproduced, however, in Appendix H. A very small number of excerpts are set forth immediately below.

(a) *Evidence of King's Knowledge of His Cause of Action*

(i) *Olson's Testimony*

Sam Olson was a King employee who was responsible for setting prices at King's Oklahoma, Texas, and Arkansas service stations. He testified that he learned of the conspiracy through telephone calls from Entriken and other conspirators starting as early as 1969. The following is one of numerous passages from Olson's testimony making it inescapably clear that, ac-

cording to his testimony, he knew of the conspiracy in 1969.[8]

Q. [by Mr. Giauque] Would you tell us the period of time, Mr. Olson?

A. 1969, virtually the summer and fall of 1969.

Q. What caused the price to increase from this 22.9 back to some higher level?

A. Well, the oil companies would get together and determine what price that they would want to go and when they would want to go and then they would contact everybody and let everyone know.

* * * *

Q. Did you learn that from telephone conversations with competitors?

A. Yes, sir.

Q. Who told you that was going on?

A. Dea Entriken [of Champlin], Mack Wright, Bob Phillips.

MR. MUNN: Are we still talking about 1969?

THE COURT: Are you talking about 1969?

THE WITNESS: Yes, sir.

[App. H, 122a] * * * *

Q. How many times would you estimate over this period, '70 to '73, would Mr. Entriken tell you in advance of a price move that it was going to take place?

A. Virtually every price move there was.

Q. Did he appear to know what he was talking about?

A. Yeah, he knew.

Q. You have any doubt in your mind that he had been talking with the other competitors?

A. No.

Q. Was there any doubt in your mind that he had been fixing prices?

A. None.

[App. H, 136a]

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[8] Further passages are contained in Appendix H beginning at 115a.

(ii) *Fred King's Testimony*

Fred King, one of the King brothers and vice-president of King & King Enterprises, testified repeatedly to facts from which the inference of knowledge of the cause of action prior to October 2, 1971, is inescapable. The following is one of numerous passages of equal clarity.[9]

> Q. [by Mr. Giauque] Now were there times when persons outside of the King organization tried to tell you what prices you should sell?
>
> A. Many times.
>
> Q. Did you have phone calls from competitors?
>
> A. Yes.

[App. H, 61a]

* * * *

> Q. All right, during the period of time, let's say, when did you first receive such phone calls?
>
> A. In '66, '67.
>
> Q. How long did such phone calls continue?
>
> A. Oh, clear up until the supposedly gas crisis they had in '73.
>
> Q. Can you tell us, Mr. King, from whom in that early period of time, that is '67 through 1969, you had phone calls from with respect to future prices?
>
> A. It would be Skinner with APCO in '68. Gerald Tush with Champlin. Eddie Warren with Vickers. A man by the name of Enloe with APCO, but I think there was a man by the name of Mooney with Kerr-McGee. We had some calls from Belanger when he was with Triangle.
>
> Q. This is Mr. Belanger who is now an officer of King?
>
> A. Yes.

[App. H, 61a-62a]

* * * *

> MR. GIAUQUE [attorney for King]: Your Honor, I want to make one thing clear. The conversation with Mr. Tush from Champlin where he

[9] Further passages are contained in Appendix H, beginning at 60a.

called and told them to get their prices up was in the area before they moved into Oklahoma and then after they moved into Oklahoma they received the same calls from different Champlin employees, price coordinators, the coordinators from Kansas City, the same in Tulsa where they moved to show the on-going conspiracy where these people would call. "We have talked to others. You get your price up or else." The same kind of threats in both areas. That as they moved into Oklahoma new people took over the same kind of conversations.[10]

[App. H, 63a]

(iii) *Carl King's Testimony*

Carl King, the other King brother and plaintiff in this action, testified in like fashion. The following is one of numerous passages of equal clarity:[11]

Q. [by Mr. Bendinger] Now at the end of the Oklahoma market, did you have conversations with any representatives of any other oil companies concerning your retail prices in Oklahoma?

A. I had a call or two from Bob Phillips with Bell Oil & Gas.

Q. Anyone else?

A. I had talked to John Barbree.

Q. Anybody else that talked to you about your prices in Oklahoma?

A. I had constant conversations with Belanger, Bill Belanger.

Q. Anybody else?

A. That's all I recall. Oh, Bill Claypool with North Western Refining Company.

Q. Let's take for a minute, Mr. King, your conversations with Mr. Belanger. Were those phone conversations?

A. Generally, yes.

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[10] King moved to Oklahoma in 1966. App. H, 57a & 84a.

[11] Further passages are contained in Appendix H, beginning at 173a.

Q. Do you remember when Mr. Belanger first called you on the subject of the retail price in Oklahoma?

A. As I recall it was March of 1968.

* * * *

Q. How many conversations would you say that you had with Mr. Belanger while he was employed by Triangle concerning your prices in Oklahoma?

A. Numerous. Two or three hundred.

[App. H, 173a-174a]

* * * *

Q. Now, back to the Belanger phone conversations, as best you recall, if you would, tell the Court and jury the substance of those conversations on the subject of your pricing in Oklahoma.

A. Well, they were, I think, they were all directed towards getting my price in Oklahoma up. And it got to be kind of a joke after a while because Belanger's superiors were asking him or instructing him to call me and I knew that, and we were also friends, but it was always the same thing. Well, the price is such and such someplace, generally it was Oklahoma, sometimes it could be other areas, and they would want me to agree to a price, or agree to a future price, or maybe get my price up with what I was presently posting at.

[App. H, 176a] * * * *

Q. But there's no doubt in your mind, is there, Mr. King, that you were asked to agree?

A. Oh, yes.

[App. H, 179a][12]

(iv) *Plaintiffs' Attorney's Summation*

In summation, King's own attorneys insisted that King and its employees knew all about the conspiracy from its outset:

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[12] Similar passages from Entriken's testimony are in Appendix H, beginning at 93a.

> Then Sam Olson was made supervisor in this area and he said that he had calls from these competitors about King's pricing before Mr. Entriken ever entered the picture. That Mack Wright called him when he was up in Kansas to complain about King's Oklahoma prices,[13] and Olson said he thought it was curious at that time when Wright told him what was going to happen in the market and he checked and it was happening. It did happen. . . . He was colluding at that time and he was telling the King folks what was going to happen and it was happening.

[App. H, 194a-195a]

* * * *

> Entriken told Olson about his discussions with the big five, Stringer and Grimes and Hines and Phillips, and he told him repeatedly that those other companies had agreed what market was moving and when it was moving.

[App. H, 199a]

* * * *

> He said that the business of being told by Mason and Entriken and Mack Wright and all these others, you either agree to go up or we'll drive you to the bottom, occurred over and over and over.

[App. H, 200a]

(b) *Ruling of the Court*

Notwithstanding the proof set forth above and a mountain of additional testimony to the same effect, the trial judge, over Champlin's express claim that the fraudulent concealment issue was one for the jury, refused to submit it to the jury and decided it himself *in favor of King*.

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[13] As the record clearly reveals, King's attorney is referring to events occurring in 1969. App. H, 118a, 120a-122a.

The issue of the statute of limitations arose twice at the trial. The first time was when Champlin sought to establish the portion of King's damages which were attributable to a time period preceding October 2, 1971. The following colloquy occurred:

> THE COURT: You want to get in the Statute of Limitations business again with him, is that right?
> MR. MUNN: Sir?
> THE COURT: You want to get into the Statute of Limitation again?
> MR. MUNN: That's the reason for one of the two subdivisions on Defendant's Exhibit 19 [reproduced in Appendix G], yes, is simply to say how much of those damages are attributable to the period prior to October 1, 1971.
> THE COURT: That issue of Statute of Limitations, we have taken care of it, haven't we?
> MR. MUNN: Have we? How?
> THE COURT: Haven't we?
> MR. MUNN: I don't know. Have we? How have we taken care of it? I'm asking for information.[14]
> MR. GIAUQUE: I would ask, Your Honor—
> MR. MUNN: Wait a minute. May I finish my argument to the Court and then you can go later.
> I'm trying to find out what you're saying to me. I don't know what you're saying when you say—
> THE COURT: Who's in charge here?
> MR. MUNN: You are.
> THE COURT: If you will let me say who talks rather than you say.
> MR. MUNN: Excuse me. I should have. Yes.
> THE COURT: Yes. Thank you.

[App. H, 186a] Without any further explanation, the trial judge sustained plaintiff's objection to this proof.

The second time the issue arose was when *plaintiff's attorney* requested the trial judge himself to rule in

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[14] In fact, the statute-of-limitations issue had never arisen before except in the context of a fourth-party complaint.

King's favor on the fraudulent concealment exception rather than to submit that issue to a jury. The following colloquy occurred immediately following this request.

> MR. MUNN: I think it would be error to so rule.
>
> THE COURT: Why?
>
> MR. MUNN: *You would in effect be taking fact questions away from the Jury . . . .*

[App. C, 44a; emphasis supplied] Soon thereafter, the trial judge turned to plaintiff's counsel and said:

> THE COURT: What ruling is it you want of the Court? That what?
>
> MR. BENDINGER: That we have sustained our burden of showing fraudulent concealment or, in addition, that they have waived their statute of limitation defense.

[App. C, 44a-45a] The Court then ruled:

> THE COURT: It's not an issue in controversy, the Court shall rule that the Plaintiff has sustained its burden.
>
> MR. MUNN: You are ruling that the statute of limitation is not an issue in controversy in the case?
>
> THE COURT: That is right.
>
> MR. MUNN: We except to the ruling.
>
> THE COURT: Plaintiff has sustained their burden as to fraudulent concealment.

[App. C, 45a]

Champlin later formally objected to the charge as follows:

> Champlin first objects to the charge in that it fails to include any instruction on the statute of limitations.

[App. H, 192a] The trial judge perfunctorily overruled the objection without explanation.[15]

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[15] King argued to the District Court that Champlin waived its statute of limitations defense. The argument was absurd. Champlin

(c) *Opinion of the Court of Appeals*

In the Court of Appeals for the Tenth Circuit, Champlin pointed out that King had the burden of proof on the fraudulent concealment issue and that Champlin was entitled to have the fraudulent concealment issue submitted to a jury. The Court of Appeals sustained the trial judge's actions, nonetheless, on the theory that the plaintiffs had established the fraudulent concealment exception as a matter of law. In arriving at this conclusion, the Court of Appeals discussed the evidence relating to *one* of the *three* elements of the fraudulent concealment exception—namely evidence generally tending to show efforts by Champlin to conceal price-fixing activities. It states at least eight times that Champlin "concealed" its alleged price-fiving acts.[16] However, nowhere does the Court of Appeals even refer to proof on the other two essential elements of the fraudulent concealment issue; whether King knew or by exercise of due diligence could have learned of the price-fixing conspiracy prior to October 2, 1971, or could in any way be excused for waiting six to eight years before bringing this suit. Of course, as has already been seen, if the Court of Appeals had ever even addressed this issue, it would have had to rule for Champlin.

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endeavored to prove that part of King's damage claim was time-barred. Champlin was blocked by the trial judge; it then argued that the issue must be submitted to the jury; and it objected when the trial judge refused to submit it to the jury. Even the trial judge did not rest his ruling on waiver. King did not argue waiver in the Court of Appeals, and the Court of Appeals did not mention the issue. It is not a real issue in the case.

[16] The Court concluded:

> The evidence showed that the defendant actively sought to conceal its price fixing activities, and the defendant's conduct, by reason of its fraudulent nature, was inherently self concealing.

657 F.2d at 1155-56.

3. *Interest on Attorney Fees*

In a Motion to Recall and Amend the Mandate, dated October 2, 1981, King requested that the Tenth Circuit award it interest on the attorney fees previously awarded by the District Court under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). This motion was opposed by Champlin. In an order dated October 15, 1981, the Tenth Circuit granted King's motion for interest on the attorneys' fee award. This order is reproduced as Appendix A.

REASONS FOR GRANTING THE WRIT

1. The Writ Should Be Granted Because The Court Of Appeals Affirmed An Action Of The District Court Judge Which So Far Departed From The Usual Course Of Judicial Proceedings As To Warrant Intervention By This Court

The Seventh Amendment to the Constitution provides that "In Suits at common law . . . the right of trial by jury shall be preserved. . . ." The trial below was in a federal court. The Seventh Amendment applies to suits in federal court under Section 4 of the Clayton Act, and it applies to the issue of the fraudulent concealment exception to the statute of limitations. *Robertson* v. *Seidman & Seidman*, 609 F.2d 583, 591 (2d Cir. 1979); *Pan American Petroleum Corp.* v. *Orr*, 319 F.2d 612, 614 (5th Cir. 1963); *Crummer Co.* v. *DuPont*, 255 F.2d 425, 428, 432-33 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958). Champlin was entitled to have disputed issues of fact relating to the statute of limitations issue resolved by a jury, not by one of the sovereign's judges. The question of whether King knew of his cause of action or could by exercise of due diligence have learned of it well over four years before he filed suit could by no stretch have been found in plaintiff's favor as a matter of law. Virtually every witness King called testified that

he knew of the conspiracy in 1969 or earlier. Champlin was entitled to have this issue submitted to a jury.

The decision by the trial judge in refusing to submit the statute of limitations issue to the jury is not one of those individual errors which this Court should properly ignore in the exercise of its discretion under its certiorari power. First, the error was too flagrant; second, it departs too radically from the accepted and usual course of judicial proceedings; third, it strikes too directly at the most central purpose of the Seventh Amendment; and fourth, review is mandated by the language of this Court's own Rules governing its certiorari jurisdiction.

(a) *The Error was too Flagrant*

The trial judge took the fraudulent concealment issue away from the jury by pure and arbitrary exercise of judicial power. He did it without reason. He did it without explanation. He did *not* even attempt to justify his ruling on the ground that the undisputed facts established the fraudulent-concealment exception as a matter of law. He could not have so ruled. The record is choked with evidence from King's own witnesses that King knew of the conspiracy at least by 1969, and had no excuse for waiting at least six years to bring this lawsuit. King's own employee testified:

> A. [Sam Olson] . . . the oil companies would get together and determine what price that they would want to go and when they would want to go and then they would contact everybody and let everyone know.
>
> * * * *
>
> Q. Did you learn that from telephone conversations with competitors?
>
> A. Yes, sir.
>
> Q. Who told you that was going on?
>
> A. Dea Entriken [the Champlin employee], Mack Wright, Bob Phillips.

MR. MUNN: Are we still talking about 1969?
THE COURT: Are you talking about 1969?
THE WITNESS: Yes, sir.

[App. H, 122a]

* * * *

Q. Was there any doubt in your mind that he [Entriken] had been fixing prices?
A. None.

[App. H, 136a]

Champlin was denied its Seventh Amendment jury right by brute force—by exercise of pure judicial power.[17]

(b) *The Error Departed too Radically from the Accepted and Usual Course of Judicial Proceedings*

It is almost impossible for a court ever to find for a *plaintiff* as a matter of law on the fraudulent concealment exception to the statute of limitations. Plaintiff always bears the burden, once the statute of limitations has run, of establishing that he falls within the exception. The knowledge element of the fraudulent concealment exception relates to plaintiff's state of mind. This is not an issue susceptible of resolution in plaintiff's favor as a matter of law. *See, e.g., Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

There have been at least 213 reported decisions in the federal courts involving Clayton Act suits in which the fraudulent concealment exception to the statute of limitations has been litigated in one form or another. The citations to these cases are set forth in the margin at the end of this paragraph. In addition, there are an estimated six hundred federal suits arising under other laws in which the fraudulent concealment exception has been litigated. *This is the only case to counsel's knowl-*

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[17] In affirming, the Court of Appeals never addressed the proof on the threshold issue of King's knowledge of the conspiracy.

edge in which a court has held the exception to be established in favor of a plaintiff as a matter of law.[18]

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[18] The following is a list of reported federal trade cases which discuss the issue of fraudulent concealment. Some, but not all, of these cases involve the question whether the exception was established as a matter of law. All are cases in which the exception was involved in some way. There are 213 cases in this list: *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322 (1978); *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974); *Norton-Children's Hospitals, Inc.* v. *James E. Smith & Sons., Inc.*, 1981-2 Trade Cas. (CCH) ¶ 64,254 (6th Cir. 1981); *King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 655 F.2d 748 (7th Cir. 1981); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); *Van Dyk Research Corp.* v. *Xerox Corp.*, 631 F.2d 251 (3d Cir. 1980); *Jewish Hospital Association* v. *Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 101 S. Ct. 1483 (1981); *United Klans of America* v. *McGovern*, 621 F.2d 152 (5th Cir. 1980); *Canadian Ace Brewing Co.* v. *Joseph Schlitz Brewing Co.*, 629 F.2d 1183 (7th Cir. 1980); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *McMahon* v. *Meredith Corp.*, 595 F.2d 433 (8th Cir. 1979); *Fitzgerald* v. *General Dairies, Inc.*, 590 F.2d 874 (10th Cir. 1979); *Harold Friedman, Inc.* v. *Thorofare Markets, Inc.*, 587 F.2d 127 (3d Cir. 1978); *City of El Paso* v. *Darbyshire Steel Co.*, 575 F.2d 521 (5th Cir. 1978), *cert. denied*, 439 U.S. 1121 (1979); *Rutledge* v. *Boston Woven Hose & Rubber Co.*, 576 F.2d 248 (9th Cir. 1978); *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 566 F.2d 494 (5th Cir. 1978); *Ashland Oil Co.* v. *Union Oil Co.*, 567 F.2d 984 (Temp. Emer. Ct. App. 1977), *cert. denied*, 435 U.S. 994 (1978); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated*, 437 U.S. 322 (1978); *Fitzgerald* v. *Seamans*, 553 F.2d 220 (D.C. Cir. 1977); *United States* v. *United States Gypsum Co.*, 550 F.2d 115 (3d Cir. 1977), *aff'd*, 438 U.S. 422 (1978); *Charlotte Telecasters, Inc.* v. *Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *In re Cessna Distributorship Antitrust Litigation*, 532 F.2d 64 (8th Cir. 1976); *Borden* v. *Sinskey*, 530 F.2d 478 (3d Cir. 1976); *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *Willmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *In re Cessna Aircraft*

Distributorship Antitrust Litigation, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947 (1975); *Schaefer* v. *First National Bank*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Telex Corp.* v. *IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Weinberger* v. *Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974); *Battle* v. *Liberty National Life Insurance Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975); *Umdenstock* v. *American Mortgage & Investment Co.*, 495 F.2d 589 (10th Cir. 1974); *Akron Presform Mold Co.* v. *McNeil Corp.*, 496 F.2d 230 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Standard Industries, Inc.* v. *Mobil Oil Corp.*, 475 F.2d 220 (10th Cir.), *cert. denied*, 414 U.S. 829 (1973); *Knuth* v. *Erie-Crawford Dairy Cooperative Association*, 463 F.2d 470 (3d Cir. 1972); *Rader* v. *Balfour*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Braun* v. *Berenson*, 432 F.2d 538 (5th Cir. 1970); *Baker F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969); *Fabert Motors, Inc.* v. *Ford Motor Co.*, 355 F.2d 888 (7th Cir.), *cert. denied*, 384 U.S. 939 (1966); *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F.2d 762 (D.C. Cir. 1965); *Laundry Equipment Sales Corp.* v. *Borg-Warner Corp.*, 334 F.2d 788 (7th Cir. 1964); *General Electric Co.* v. *City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Rinzler* v. *Westinghouse Electric Corp.*, 333 F.2d 719 (5th Cir. 1964); *Westinghouse Electric Corp.* v. *Pacific Gas & Electric Co.*, 326 F.2d 575 (9th Cir. 1964); *Westinghouse Electric Corp.* v. *City of Burlington*, 326 F.2d 691 (D.C. Cir. 1964); *Allis-Chalmers Manufacturing Co.* v. *Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Public Service Co.* v. *General Electric Co.*, 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Atlantic City Electric Co.* v. *General Electric Co.*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *City of Kansas City* v. *Federal Pacific Electric Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), *cert. denied*, 373 U.S. 914 (1963); *Moviecolor, Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961); *Crummer Co.* v. *DuPont*, 255 F.2d 425 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958); *Crummer Co.* v. *DuPont*, 223 F.2d 238 (5th Cir.), *cert. denied*, 350 U.S. 848 (1955); *Suckow Borax Mines Consolidated, Inc.* v. *Borax Consolidated, Ltd.*, 185 F.2d 196 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924 (1949); *Davis* v.

Edgemere Finance Co., No. K-81-5 (D. Md. Sept. 30, 1981); *In re Screws Antitrust Litigation*, 1981-2 Trade Cas. (CCH) ¶ 64,211 (D. Mass. 1981); *In re Corrugated Container Antitrust Litigation*, 1981-1 Trade Cas. (CCH) ¶ 64,114 (S.D. Tex. 1981); *Bunker Ramo Corp.* v. *Cywan*, 511 F. Supp. 531 (N.D. Ill. 1981); *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (E.D. Pa. 1981); *Chatham Brass Co.* v. *Honeywell, Inc.*, 512 F. Supp. 108 (S.D.N.Y. 1981); *Nazon Telesign Corp.* v. *Bunker Ramo Corp.*, 517 F. Supp. 804 (N.D. Ill. 1981); *Bohack Corp.* v. *Iowa Beef Processors, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,804 (E.D.N.Y. 1981); *In re Corrugated Container Antitrust Litigation*, 1980-81 Trade Cas. (CCH) ¶ 63,669 (S.D. Tex. 1980); *Chipanno* v. *Champion International Corp.*, 1980-81 Trade Cas. (CCH) ¶ 63,805 (D. Ore. 1980); *In re Glassine & Greaseproof Paper Antitrust Litigation*, 88 F.R.D. 302 (E.D. Pa. 1980); *In re Electric Weld Steel Tubing Antitrust Litigation*, 1980-81 Trade Cas. (CCH) ¶ 63,783 (E.D. Pa. 1980); *Technical Learning Collective, Inc.* v. *Daimler-Benz Aktiengesellschaft*, 1980-81 Trade Cas. (CCH) ¶ 63,612 (D. Md. 1980); *Ingram Corp.* v. *J. Ray McDermott & Co.*, 495 F. Supp. 1321 (E.D. La. 1980); *In re Folding Carton Antitrust Litigation*, 1980-2 Trade Cas. (CCH) ¶ 63,459 (N.D. Ill. 1980); *Robert's Waikiki U-Drive, Inc.* v. *Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199 (D. Hawaii 1980); *Vanco Beverage, Inc.* v. *Falls City Industries, Inc.*, 1980-2 Trade Cas. ¶ 63,357 (S.D. Ind. 1980), *aff'd in part and rev'd in part*, 654 F.2d 1224 (7th Cir. 1981); *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, 493 F. Supp. 320 (S.D.N.Y. 1980); *In re Marine Construction Antitrust Litigation*, 487 F. Supp. 1355 (J.P.M.D.L. 1980); *Ingram Corp.* v. *J. Ray McDermott & Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,319 (E.D. La. 1980); *Stegeman* v. *Aetna Insurance Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,256 (E.D. Mich. 1980); *Transitron Electronic Corp.* v. *Hughes Aircraft Co.*, 487 F. Supp. 885 (D. Mass. 1980), *aff'd*, 649 F.2d 871 (1st Cir. 1981); *Ingram Corp.* v. *J. Ray McDermott & Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,277 (E.D. La. 1980); *Impervious Paint Industries, Ltd.* v. *Ashland Oil, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,138 (W.D. Ky. 1980); *Jicarilla Apache Tribe* v. *Supron Energy Corp.*, 479 F. Supp. 536 (D.N.M. 1979); *In re Folding Carton Antitrust Litigation*, 84 F.R.D. 245 (N.D. Ill. 1979); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F. Supp. 1150 (S.D.N.Y. 1979), *aff'd*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 3051 (1981); *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,894 (E.D. Wash. 1979); *General Atomic Co.* v. *Exxon Nuclear Co.*, 1979-2 Trade Cas. (CCH) ¶ 62,966 (S.D. Cal. 1979); *Van Dyk Research Corp.* v. *Xerox Corp.*, 478 F. Supp. 1268

(D.N.J. 1979), *aff'd*, 631 F.2d 251 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 3029 (1981); *In re Armored Car Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,891 (N.D. Ga. 1979); *Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 473 F. Supp. 1296 (D. Hawaii 1979); *Technical Learning Collective, Inc.* v. *Daimler-Benz Aktiengesellschaft*, 1980-1 Trade Cas. (CCH) ¶ 63,006 (D. Md. 1979); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260 (N.D. Ill. 1979); *In re Independent Gasoline Antitrust Litigation*, 1979-2 Trade Cas. (CCH) ¶ 62,863 (D. Md. 1979); *B.B. Walker Co.* v. *Ashland Chemical Co.*, 474 F. Supp. 651 (M.D.N.C. 1979); *In re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N.D. Cal. 1979); *Timex Corp.* v. *Barmatic Products Co.*, 1979-2 Trade Cas. (CCH) ¶ 62,877 (E.D.N.Y. 1979); *Levine* v. *McDonald's Corp.*, 1979-2 Trade Cas. (CCH) ¶ 62,730 (D. Ariz. 1979); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 256 (N.D. Ill. 1979); *Falstaff Brewing Corp.* v. *Phillip Morris, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,814 (N.D. Cal. 1979); *In re Uranium Antitrust Litigation*, 472 F. Supp. 393 (N.D. Ill. 1979); *In re Armored Car Antitrust Litigation*, 472 F. Supp. 1357 (N.D. Ga. 1979), *aff'd in part and rev'd in part*, 645 F.2d 488 (5th Cir. 1981); *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D. Pa. 1979); *Brown* v. *Cameron-Brown Co.*, 1979-1 Trade Cas. (CCH) ¶ 62,656 (E.D. Va. 1979); *Hedges Enterprises, Inc.* v. *Continental Group, Inc.*, 81 F.R.D. 461 (E.D. Pa. 1979); *General Aircraft Corp.* v. *Air America, Inc.*, 482 F. Supp. 3 (D.D.C. 1979); *In re Cessna Aircraft Distributorship Antitrust Litigation*, 460 F. Supp. 159 (J.P.M.D.L. 1978); *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707 (M.D. Pa. 1978), *aff'd in part mem. and vacated in part mem. sub. nom. Colonial Fuel Co.* v. *Blue Coal Corp.*, 612 F.2d 571 (3d Cir. 1979); *Wilkes-Barre Steam Heat Co.* v. *Blue Coal Corp.* (3d Cir. 1979); *Appeal of Wilkes-Barre Steam Heat Co.*, 612 F.2d 576 (3d Cir. 1979); *Folding Cartons, Inc.* v. *American Can Co.*, 79 F.R.D. 698 (N.D. Ill. 1978); *In re Corrugated Container Antitrust Litigation*, 80 F.R.D. 244 (S.D. Tex. 1978); *Hoyt Construction Co.* v. *Alside, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,243 (D. Minn. 1978); *Gibbons, Green & Rice, Ltd.* v. *White Motor Corp.*, No. 77 Civ. 2629 (S.D.N.Y. Jul. 28, 1978); *In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552 (D. Md. 1978); *In re Anthracite Coal Antitrust Litigation*, 78 F.R.D. 709 (M.D. Pa. 1978); *In re Anthracite Coal Antitrust Litigation*, 1978-1 Trade Cas. (CCH) ¶ 62,059 (M.D. Pa. 1978); *In re General Aircraft Corp. Antitrust/Tort Claims Act Litigation*, 449 F. Supp. 604 (J.P.M.D.L. 1978); *Canadian Ace Brewing Co.* v. *Anheuser-Busch, Inc.*, 448 F. Supp. 769 (N.D. Ill. 1978), *aff'd mem.*, 601 F.2d 593 (7th Cir.), *cert. denied*, 444 U.S. 884 (1979);

Copies Unlimited, Inc. v. *Boise Cascade Corp.*, 1978-1 Trade Cas. (CCH) ¶ 61,385 (S.D. Ohio 1978); *Krehl* v. *Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108 (C.D. Cal. 1978); *King & King Enterprises* v. *Champlin Petroleum Co.*, 446 F. Supp. 906 (E.D. Okla. 1978); *Jewish Hospital Association* v. *Struck Construction Co.*, 77 F.R.D. 59 (W.D. Ky. 1978); *Lohse* v. *Dairy Commission*, 1977-2 Trade Cas. (CCH) ¶ 61,805 (D. Nev. 1977); *Northland Equities, Inc.* v. *Gateway Center Corp.*, 441 F. Supp. 259 (E.D. Pa. 1977); *Photovest Corp.* v. *Fotomat Corp.*, 1977-1 Trade Cas. ¶ 61,529 (D. Ind. 1977), *aff'd in part and rev'd in part*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Western States Telephone Co.* v. *AT&T*, 1977-1 Trade Cas. (CCH) ¶ 61,502 (C.D. Cal. 1977); *In re Piper Aircraft Distribution System Antitrust Litigation*, 1976-2 Trade Cas. (CCH) ¶ 61,223 (W.D. Mo. 1976); *Sun Newspapers, Inc.* v. *Minneapolis Star & Tribune Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,254 (D. Minn. 1976); *Falstaff Brewing Corp.* v. *Boatmen's National Bank*, 1978-1 Trade Cas. (CCH) ¶ 61,980 (E.D. Mo. 1976); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); *Chevalier* v. *Baird Savings Association*, 72 F.R.D. 140 (E.D. Pa. 1976); *Computer Statistics, Inc.* v. *Blair*, 418 F. Supp. 1339 (S.D. Tex. 1976); *Illinois* v. *Ralph Vancil, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 61,025 (S.D. Ill. 1976); *Ohio, ex. rel. Brown* v. *Klosterman French Baking Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,361 (S.D. Ohio 1976); *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090 (N.D. Tex. 1976), *aff'd in part and rev'd in part*, 566 F.2d 494 (5th Cir. 1978); *In re Sugar Industry Antitrust Litigation*, 1977-1 Trade Cas. (CCH) ¶ 61,373 (N.D. Cal. 1976); *Pearl Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976); *Chmieleski* v. *City Products Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976); *In re Plywood Antitrust Litigation*, 76 F.R.D. 570 (E.D. La. 1976); *Lowe* v. *Safeway Stores, Inc.*, 1975-2 Trade Cas. (CCH) ¶ 60,659 (N.D. Iowa 1975); *Pony Creek Cattle Co.* v. *Great Atlantic & Pacific Tea Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,660 (N.D. Tex. 1975); *In re Arizona Bakery Products Litigation*, 1975-2 Trade Cas. (CCH) ¶ 60,556 (D. Ariz. 1975); *In re Coordinated Pretrial Proceedings in the Western Liquid Asphalt Cases*, 1976-2 Trade Cas. (CCH) ¶ 61,164 (N.D. Cal. 1975); *United States* v. *IBM Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,494 (S.D.N.Y. 1975); *Ungar* v. *Dunkin' Donuts of America, Inc.*, 68 F.R.D. 65 (E.D. Pa. 1975); *Chevalier* v. *Baird Savings Association*, 66 F.R.D. 105 (E.D. Pa. 1975); *Benoit* v. *Burlington Industries, Inc.*, 1975-1 Trade Cas. (CCH) ¶ 60,160 (S.D.N.Y. 1975); *Ohio* v. *Richter Concrete Corp.*, 69 F.R.D. 604 (S.D. Ohio 1975); *In re Transit Co. Tire Antitrust Litigation*, 67 F.R.D. 59 (W.D. Mo. 1975); *Dayco Corp.* v. *Fire-*

stone Tire & Rubber Co., 386 F. Supp. 546 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975); *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 1974-2 Trade Cas. (CCH) ¶ 75,377 (N.D. Ohio 1974), *aff'd*, 523 F.2d 389 (6th Cir. 1975); *Benoit* v. *Burlington Industries, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,295 (S.D.N.Y. 1974); *Willmar Poultry Co.* v. *Morton-Norwich Products, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,292 (D. Minn. 1974), *aff'd*, 520 F.2d 289 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976); *Serpa* v. *Jolly King Restaurants, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,302 (S.D. Cal. 1974); *Glazer Steel Corp.* v. *Toyomenka, Inc.*, 392 F. Supp. 500 (S.D.N.Y. 1974); *Chevalier* v. *Baird Savings Association*, 371 F. Supp. 1282 (E.D. Pa. 1974); *Ralston* v. *Volkswagenwerk, A.G.*, 61 F.R.D. 427 (W.D. Mo. 1973); *Honeywell, Inc.* v. *Sperry Rand Corp.*, 1974-1 Trade Cas. (CCH) ¶ 74,874 (D. Minn. 1973); *Telex Corp.* v. *IBM Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *aff'd in part and rev'd in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); *Chambers & Barber, Inc.* v. *General Adjustment Bureau, Inc.*, 60 F.R.D. 455 (S.D.N.Y. 1973); *Forbes* v. *Greater Minneapolis Area Board of Realtors*, 1973-2 Trade Cas. (CCH) ¶ 74,627 (D. Minn. 1973); *Graybeal* v. *American Savings & Loan Association*, 1973 Trade Cas. (CCH) ¶ 74,600 (D.D.C. 1973); *Bill Minnielli Cement Contracting, Inc.* v. *Richter Concrete Corp.*, 62 F.R.D. 381 (S.D. Ohio 1973); *Forbes* v. *Greater Minneapolis Area Board of Realtors*, 61 F.R.D. 416 (D. Minn. 1973); *Graybeal* v. *American Savings & Loan Association*, 59 F.R.D. 7 (D.D.C. 1973); *Wainwright* v. *Krafteo Corp.*, 58 F.R.D. 9 (N.D. Ga. 1973); *City of Detroit* v. *Grinnell Corp.*, 356 F. Supp. 1380, *aff'd in part and rev'd in part*, 495 F.2d 448 (2d Cir. 1974); *Lupia* v. *Stella D'Oro Biscuit Co.*, 1974-1 Trade Cas. (CCH) ¶ 75,046 (N.D. Ill. 1972); *Saunders* v. *National Basketball Association*, 348 F. Supp. 649 (N.D. Ill. 1972); *Althoff's, Inc.* v. *Sterling Faucet Co.*, 1972 Trade Cas. (CCH) ¶ 74,066 (N.D. Ill. 1972); *In re Hotel Telephone Charge Antitrust Litigation*, 341 F. Supp. 771 (J.P.M.D.L. 1972); *Mississippi Petroleum, Inc.* v. *Vermont Gas Systems, Inc.*, 1972 Trade Cas. (CCH) ¶ 73,843 (S.D. Miss. 1972); *In re Kauffman Mutual Fund Actions*, 337 F. Supp. 1337 (J.P.M.D.L. 1972); *City of Philadelphia* v. *American Oil Co.*, 53 F.R.D. 45 (D.N.J. 1971); *Consolidated Edison Co.* v. *DiNapoli*, 1971 Trade Cas. (CCH) ¶ 73,570 (S.D.N.Y. 1971); *Rutledge* v. *Electric Hose & Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975); *Utah* v. *American Pipe & Construction Co.*, 50 F.R.D. 99, *aff'd in part and rev'd in part*, 473 F.2d 580 (9th Cir. 1973), *aff'd*, 414 U.S. 538 (1974); *Interamerican Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *Maricopa County* v. *American Pipe & Construction Co.*, 303 F.

Supp. 77 (D. Ariz. 1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971); *In re "East of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. 244 (J.P.M.D.L. 1969); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N.D. Ill. 1969); *Dairy Foods Inc.* v. *Farmer Co-Operative Creamery*, 298 F. Supp. 774 (D. Minn. 1969); *Picoult* v. *Ralston Purina Co.*, 1969 Trade Cas. (CCH) ¶ 72,681 (S.D.N.Y. 1969); *In re Multidistrict Private Civil Treble Damage Litigation Involving Plumbing Fixtures*, 298 F. Supp. 484 (J.P.M.D.L. 1968); *Rader* v. *Balfour*, 1969 Trade Cas. (CCH) ¶72,709 (N.D. Ill. 1968); *rev'd*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Ellingson Timber Co.* v. *Great Northern Railway*, 1968 Trade Cas. (CCH) ¶ 72,506 (D. Ore. 1968), *aff'd*, 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968); *SCM Corp.* v. *Radio Corp. of America*, 276 F. Supp. 373 (S.D.N.Y. 1967), *aff'd*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969); *Michigan* v. *Morton Salt Co.*, 1966 Trade Cas. (CCH) ¶ 71,847 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co.* v. *Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967); *International Railways of Central America* v. *United Fruit Co.*, 1966 Trade Cas. (CCH) ¶ 71,767 (S.D.N.Y. 1966), *aff'd in part and rev'd in part*, 373 F.2d 408 (2d Cir.), *cert. denied*, 387 U.S. 921 (1967); *City of Burlington* v. *Westinghouse Electric Corp.*, 246 F. Supp. 839 (D.D.C. 1965); *Ohio Valley Electric Corp.* v. *General Electric Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965); *Illinois* v. *Sperry Rand Corp.*, 1965 Trade Cas. (CCH) ¶ 71,349 (N.D. Ill. 1965); *City of Burlington* v. *Westinghouse Electric Corp.*, 215 F. Supp. 497 (D.D.C. 1963), *aff'd*, 326 F.2d 691 (D.C. Cir. 1964); *Department of Water & Power* v. *Allis-Chalmers Manufacturing Co.*, 213 F. Supp. 341 (S.D. Cal. 1963); *Rinzler* v. *Westinghouse Electric Corp.*, 1963 Trade Cas. (CCH) ¶ 70,723 (N.D. Ga. 1962), *rev'd*, 333 F.2d 719 (5th Cir. 1964); *Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 211 F. Supp. 712 (N.D. Ill. 1962), *aff'd in part and rev'd in part*, 323 F.2d 412 (7th Cir. 1963); *Brigham City Corp.* v. *General Electric Co.*, 210 F. Supp. 574 (D. Utah 1962); *Public Service Co.* v. *Allen Bradley Co.*, 1962 Trade Cas. (CCH) ¶ 70,549 (D. Colo. 1962), *aff'd in part and rev'd in part*, 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 210 F. Supp. 557 (N.D. Ill. 1962), *aff'd*, 315 F.2d 558 (7th Cir. 1963); *United States* v. *General Electric Co.*, 1962 Trade Cas. (CCH) ¶ 70,438 (E.D. Pa. 1962); *City of Kansas City* v. *Federal Pacific Electric Co.*, 210 F. Supp. 545 (W.D. Mo.), *rev'd*, 310 F.2d 271 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962), *cert. denied*, 373 U.S. 914 (1963); *Public*

(c) *The Error Strikes too Directly at the Seventh Amendment's Core*

Champlin had urged throughout this case, whether rightly or wrongly, that the trial judge who refused to submit the fraudulent concealment issue to the jury was inexplicably and unusually hostile to its case.[19] Indeed,

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Service Co. v. *A.B. Chance Co.*, 1962 Trade Cas. (CCH) ¶ 70,551 (D.N.M. 1962), *aff'd in part and rev'd in part*, 315 F.2d 306 (10th Cir.), *cert. denied*, 374 U.S. 809 (1963); *Atlantic City Electric Co.* v. *General Electric Co.*, 207 F. Supp. 613 (S.D.N.Y.), *aff'd*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Banana Distributors, Inc.* v. *United Fruit Co.*, 1962 Trade Cas. (CCH) ¶ 70,357 (S.D.N.Y. 1962); *Gaetzi* v. *Carling Brewing Co.*, 205 F. Supp. 615 (E.D. Mich. 1962); *N.W. Electric Power Cooperative, Inc.* v. *General Electric Co.*, 30 F.R.D. 557 (W.D. Mo. 1961); *Norman Tobacco & Candy Co.* v. *Gillette Safety Razor Co.*, 197 F. Supp. 333 (N.D. Ala. 1960), *aff'd*, 295 F.2d 362 (5th Cir. 1961); *Service Stages, Inc.* v. *Greyhound Corp.*, 170 F. Supp. 482 (N.D. Ga), *aff'd*, 268 F.2d 739 (5th Cir. 1959); *International Nickel Co.* v. *Ford Motor Co.*, 166 F. Supp. 551 (S.D.N.Y. 1958); *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 1960 Trade Cas. (CCH) ¶ 69,692 (S.D.N.Y. 1960), *aff'd*, 288 F.2d 80 (2d Cir. 1961), *cert. denied*, 368 U.S. 821 (1962); *Crummer Co.* v. *DuPont*, 1957 Trade Cas. (CCH) ¶ 68,687 (N.D. Fla. 1957), *rev'd*, 255 F.2d 425 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958); *Klein* v. *Lionel Corp.*, 130 F. Supp. 725 (D. Del. 1955); *Crummer Co.* v. *DuPont*, 117 F. Supp. 870 (N.D. Fla. 1954), *rev'd*, 223 F.2d 238 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958); and, *Florida Wholesale Drug, Inc.* v. *Ronson Art Metal Works, Inc.*, 110 F. Supp. 573 (D.N.J. 1953).

[19] Champlin's brief to the Court of Appeals began with the following paragraph:

> With deference and regret we are constrained to begin by noting the inexplicable animosity of the court below to the defendant and its counsel which permeated the trial proceedings, because we are convinced it accounts for what, in our view, are massive and cumulative errors depriving the defendant of a fair trial and virtually assuring the plaintiffs of a favorable jury verdict. Limitations of space permit only illustrative, not exhaustive, exposures.

Brief for Appellant at 1, *Champlin Petroleum Co.* v. *King & King Enterprises*, 657 F.2d 1147 (10th Cir. 1981).

Champlin has now been formally notified that the trial judge has agreed to testify against it in a personal lawsuit by Entriken against Champlin for malicious prosecution.[20] Champlin's claims of bias by the District Judge have been rejected. This is understandable as such claims are honored by Courts of Appeals only rarely.

Litigants' prime protection from biased judges in our legal system stems from the guaranty of a trial by a jury in the Seventh Amendment to the Constitution. As this Court has often noted, the right to a jury trial is designed to protect a litigant from a "biased or eccentric" judge. *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders. . . ." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting). It is "an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Id.* at 343.

(d) *This Court's Own Rules Mandate that the Petition Be Granted*

Rule 17 of this Court's Rules sets forth the circumstances in which this Court will grant a petition for a writ of certiorari. One such circumstance is "[w]hen a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, *or so far sanctioned such a departure by a lower court*, as to call for an exercise of this Court's power of supervision." Rule 17.1(a) (emphasis supplied). If this part of the Court's Rules has any meaning at all, this Court should grant the writ in this case. A federal court deprived Champlin of its Seventh Amendment jury right through a raw exercise of judicial power. The Tenth Circuit Court of Appeals sanctioned it. The integrity of the judicial process requires that this Court intervene.

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[20] *Entriken* v. *Champlin Petroleum Co., Case* No. CT-80-659 (D. Ct. Tulsa Cnty, Okla.). *See* App. I, 202a.

Correcting injustice in the individual case is still an appropriate function of the highest court in the land. We respectfully request that the judgment of the Court of Appeals be summarily reversed so that a new trial may be had in the District Court, or, in the alternative, that the Court of Appeals' judgment be vacated and it be directed to consider the question whether the record evidence creates a triable issue of fact on the question whether King knew or by exercise of due diligence could have learned of the conspiracy prior to the limitations period.

2. The Tenth Circuit's Award of Interest on King's Attorney-Fee Award Is in Conflict With a Decision of the Fifth Circuit and With Section 4 of the Clayton Act

The Tenth Circuit held that King is entitled to post-judgment interest on the attorneys' fees awarded by the district court under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).[21] App. A. at 2a. The Ninth Circuit also has held that interest may accrue on attorneys' fees awarded under Section 4 of the Clayton Act. *Perkins* v. *Standard Oil Co.*, 487 F.2d 672 (9th Cir. 1973). The Fifth Circuit has held the exact opposite. The Fifth Circuit has expressly held that Section 4 of the Clayton Act does not permit a court to award interest on attorneys' fee awards. *Carpa, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316, 1321 (5th Cir. 1978).[22]

There is, therefore, a square conflict between the law of the Fifth Circuit and the law of the Ninth and Tenth Circuits on this point. The question of interest on awards of attorneys' fees under the Clayton Act has

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[21] The interest rate is twelve percent. The attorneys' fee award of $553,281.31 was entered on July 8, 1980. App. E, 47a.

[22] The Fifth Circuit has allowed interest on attorneys' fees awarded under other, differently-construed statutes. *Gates* v. *Collier*, 636 F.2d 942, 943 (5th Cir. 1981) (*per curiam*) (interest allowed on attorneys' fees awarded under 42 U.S.C. § 1988).

arisen in hundreds of cases in the past and will arise in hundreds of cases in the future. It arises in every single successful private damage suit under the antitrust laws. It is a more important question to litigants now than in the past because of increased interest rates and attorney fees. It is a question arising under a federal statute. Federal law on this issue should be uniform throughout the federal system. This Court should resolve it one way or the other. It is not a complex issue. The Court could resolve it summarily.

The Fifth Circuit's decision is far better reasoned than that of the Ninth or Tenth Circuits, and its decision should be adopted by this Court. The Fifth Circuit points out that post-judgment interest in federal cases flows from 28 U.S.C. § 1961 (1976), allowing interest on "money judgment[s]." Costs have always been taken *not* to be part of a "money judgment," and interest has never been awarded on costs. *Carpa*, 567 F.2d at 1322; *Davis* v. *Fidelity & Deposit Co.*, 73 F.2d 118, 120 (D.C. Cir. 1934); *People's Bank* v. *Aetna Insurance Co.*, 76 F. 548, 549-50 (C.C.S.C. 1896); *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 214 F. Supp. 383, 418 (D. Md. 1963).

The Clayton Act expressly treats attorneys' fees as a cost. It states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and *the cost of suit, including a reasonable attorney's fee.*

15 U.S.C. § 15 (1976) (emphasis supplied). Therefore, interest may not be awarded on attorneys' fees awarded under the Clayton Act.

The Fifth Circuit stated:

> Congress did not see fit to reverse the traditional practice of not awarding interest on court costs, if indeed it considered the question of interest or the

> policies underlying the historical practice. . . ., we see no basis for stretching the applicable statutory language to provide interest on the award of attorneys' fees to successful antitrust plaintiffs.

567 F.2d at 1322-23.

This conflict should be resolved so that one uniform federal rule will prevail. This Court should resolve this conflict by holding that interest does not accrue on attorney-fee awards under Section 4 of the Clayton Act.

CONCLUSION

The petition for a writ of certiorari should be granted. The United States Court of Appeals for the Tenth Circuit should be reversed on both questions presented.

Respectfully submitted,

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November 16, 1981

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) SS
CITY OF WASHINGTON)

On behalf of Champlin Petroleum Company and pursuant to Supreme Court Rules 19.3, 28.3, and 28.5(c), I have caused three copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to be served by mail upon:

Richard W. Giauque
Giauque & Williams
500 Kearns Building
136 South Main
Salt Lake City, Utah 84101

counsel of record for King & King Enterprises, d/b/a King Gas & Oil, and Carl R. King, d/b/a King Gas & Oil, respondents. These documents were deposited in a United States mailbox, with first-class postage prepaid, this sixteenth day of November, 1981.

All parties required to be served have been served.

JOHN W. NIELDS, JR.
Attorney for Champlin Petroleum Company, Petitioner

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Subscribed and sworn to before me this ——— day of ———.

November, 1981.

Notary Public

My Commission Expires: ———

Appendix 1

81-929

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHAMPLIN PETROLEUM COMPANY,
Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SEPTEMBER TERM—October 15, 1981

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

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No. 80-1630

(D.C. No. 75-276-C)

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs-Appellees,

vs.

CHAMPLIN PETROLEUM COMPANY,
Defendant-Appellant,

FRED DEA ENTRIKEN,
Third Party Defendant-Appellee,

DEWEY MASON and MICKEY BOWLES,
Fourth Party Defendants.

This matter comes on for consideration of:

1. The motion of Champlin Petroleum Company, asking the Court to recall the mandate issued in the captioned appeal on September 22, 1981, and to stay the reissuance pending application for certiorari.

2. The motion of appellees to recall the mandate for amendment pursuant to Rule 37, Federal Rules of Appellate Procedure, to allow interest on the reduced judgment at the rate of 12% from the date of the original judgment and on the lower court's judgment to appellees for attorneys' fees, in accord with applicable law.

Upon consideration whereof, it is ordered:

1. The mandate issued to the United States District Court for the Eastern District of Oklahoma on September 22, 1981, is hereby recalled.

2. The judgment entered in the captioned cause on August 3, 1981, is amended, in pertinent part, to read as follows:

> "Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part and reversed in part. The cause is remanded to the United States District Court for the Eastern District of Oklahoma with instructions to reduce the treble damages awarded to $1,360,770.00. That Court, pursuant to the provisions of Rule 37, Federal Rules of Appellate Procedure, shall allow interest on the reduced judgment from the date of the original judgment and on the lower court's judgment to appellees for attorneys' fees and on the statement of costs issued on September 22, 1981, in the sum of $1,924.49, all in accordance with applicable law."

3. Reissuance of the mandate is stayed until November 16, 1981. If, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that a party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition of the Supreme Court.

4. This order is conditioned upon the continuance in full force and effect of the supersedeas bond filed with the Clerk of the United States District Court for the Eastern District of Oklahoma in the amount of $3,500,000 until the Supreme Court has finally disposed of the certiorari petition.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1630

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs-Appellees,

v.

CHAMPLIN PETROLEUM COMPANY,
Defendant-Appellant.

Argued March, 19, 1981

Decided Aug. 3, 1981

Richard W. Giauque, Berman & Giauque, Salt Lake City, Utah (Gary F. Bendinger and James R. Holbrook, Berman & Giauque, Salt Lake City, Utah, with him on the brief), for plaintiffs-appellees.

Cecil E. Munn, Cantey, Hanger, Gooch, Munn & Collins, Fort Worth, Tex. (Charles A. Zubieta, Champlin Petroleum Co., A. Camps Bonds, Bonds, Matthews, Bonds & Hayes, Muskogee, Okl., and Mark C. Hill, Fort Worth, Tex., with him on the brief), for defendant-appellant.

Before SETH, Chief Judge, and BARRETT and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

King and King were plaintiffs below in a private anti-trust action which arose under § 1 of the Sherman Act,

15 U.S.C. § 1, 1980. Champlin Petroleum Co. is the defendant and the appellant. The complaint alleged violations of both § 1 and § 2 of the Sherman Act. Also there is a third party action against one Fred Dea Entriken, a former Champlin employee. In this third party claim it is alleged that if Champlin was found liable in the King action that Entriken should be held responsible for the damages which Champlin is required to pay. Entriken filed a fourth party action against Mickey Bowles and Dewey Mason, two of his superiors during the time he was employed by Champlin. There he alleged that he had acted in accordance with instructions and with company policy. Prior to the trial King withdrew his claims against Champlin under § 2 of the Sherman Act for predatory and coercive pricing and refusal to deal. The trial began on April 21, 1980 on King's claim of price fixing under § 1 of the Sherman Act and the issue and amount of damages, and on the third and fourth party claims. The jury found in favor of King on the price fixing claim against Champlin and in favor of Entriken on the third party action. Champlin appeals herein from the judgment against it on the price fixing claim. It does not appeal the judgment on the third party action.

STATEMENT OF THE FACTS

King and King Enterprises is owned by Carl King and Fred King; the company markets gasoline. King Gas and Oil Company operates retail gas stations in Oklahoma, Arkansas and Texas. This latter company is a sole proprietorship which is owned by Carl King. King and King Enterprises supplies gasoline to the King gas stations.

Champlin Petroleum Company is an integrated oil company which refines gasoline and sells gasoline at both levels, retail and wholesale, in Oklahoma, Arkansas and Texas under the brand names of Champlin and Harbor.

When King entered the gasoline market in Oklahoma, Texas and Arkansas, which was in 1966 or 1967, there

were three types of retail gasoline marketers. At the top were the major oil companies such as Texaco, Shell and Phillips, which companies were vertically integrated in that they operated refineries and sold gas both at wholesale and retail levels. These companies operated full service gas stations and sold products other than gas, such as batteries, tires, and accessories. They advertised and accepted credit cards.

In the middle were the mini-majors or branded independents such as Champlin, Apco, Consumers and Fina. These stations generally were the full service type. They operated in the same fashion as the majors but did not have the national reputation enjoyed by the majors and sometimes were not vertically integrated. Below the "mini-majors" were full service unbranded independents, such as Hudson Oil Co.

At the time (1966, 1967) King entered the gas market in the states mentioned above, the majors' normal price for regular gasoline was 34.9 cents per gallon. The mini-major normal price for regular gasoline was 32.9 cents per gallon, and the branded independent's normal price for regular gasoline was 31.9 cents per gallon. The difference in the prices of gasoline between the three types of stations was called a "spot." By this is meant that the mini-majors had a two cent spot on the majors and the unbranded independents had a one cent spot on the mini-majors. King was and is a self-service unbranded independent marketer. It decided to take a two cent spot on Hudson and other full service independents, and to charge 29.9 cents per gallon for regular gas. King had determined that this was its optimum price, which would allow it to maximize gross profits and volume of sales. Prior to King's entry in the market there were no unbranded self-service independents who took a spot on the mini-majors and full service unbranded independents. King was an admitted price cutter and was the first self-service marketer to attempt to take such a spot.

GENERAL NATURE OF THE CASE

King alleged that Champlin freely and regularly exchanged market information with its competitors, not including King however, and entered into price fixing agreements with those competitors for the purpose of forcing King, and other self-service unbranded independents who proceeded as King was proceeding in taking a spot on the full service unbranded independents, to eliminate their spot, and, thus, to eliminate price cutting. It was the claim of King that Champlin first tried to dictate King's selling price by threatening to take the price of gas "to the bottom," that is, below King's actual cost for the gas, if King refused to eliminate its spot. When King failed to do so, Champlin and his co-conspirators collusively agreed to lower price below an acceptable level to King and restore prices to normal once they felt King had suffered by low prices to such an extent that King would be willing to surrender. King alleged that the method employed to accomplish the goals was as follows:

Champlain and its co-conspirators granted competitive price allowances (CPAs) to their dealers. Under the competitive price allowance Champlin and others would guarantee their dealers a certain margin of profit, so that even when the dealers were selling gas at lower than normal prices, the dealers were still able to make a dependable margin of profit. Thus, Champlin and its co-conspirators, rather than their dealers, would absorb the loss caused by the sale of gasoline at lower than normal prices. Champlin and its competitors would recommend that their dealers sell at lower than normal prices and the dealers would still make a profit. Prices would go down in a stairstep pattern with King reducing his prices accordingly to keep his spot. When prices reached the bottom, that is at or near the cost of the gasoline to King, the Champlin dealers were guaranteed a profit be-

cause of the competitive price allowances, while King, who did not receive these allowances, was forced to absorb the entire loss caused by the price decreases. This CPA program, of course, cost Champlin and its co-conspirators a great deal of money. Thus, as soon as practicable the companies were anxious to restore the market to its normal level by pulling back the CPAs when it was felt that King had been sufficiently harmed and would be ready to surrender. Therefore the companies conspired to pull their CPAs and fix the price of gasoline at a certain level. As a result of Champlin's price fixing activites, King alleges that it was unable to sell gasoline at its optimum price and was injured thereby.

Champlin, on the other hand, rather than directly addressing King's price fixing claims, appears to have been arguing that: "If King has any cause of action at all, it is one for predatory and coercive pricing; but King doesn't have a claim for predatory and coercive price because . . . ." The appellant's contentions caused great confusion during the trial of the case for the reason that they were insisting on being allowed to defend a predatory and coercive pricing claim, whereas the only claim that was being litigated by the plaintiffs was one of price fixing. It should be brought out here and now that regardless of appellant's thought that King's claim should have been for predatory and coercive pricing, a claim which it was apparently prepared to defend itself against, the fact remains that King did confine itself to a claim for price fixing at the trial. King had withdrawn its claim based on predatory and coercive pricing prior to trial. So, inasmuch as predatory and coercive pricing was not a claim at the trial, it was not possible for the appellant, Champlin, to offer a defense against such claim. Much of the evidence which appellant sought to introduce at trial was therefore rejected by the trial court. Because of the lack of effective communication between

the parties, the lawyers for both spent a great deal of time at the bench arguing evidentiary matters to the judge out of the presence of the jury.

Champlin raises several questions on this appeal:

1. That it was error for the trial court to receive in evidence testimony of Mr. Caldwell, an expert witness called by the plaintiffs, regarding calculations which he made as to the sum total of losses suffered by plaintiffs during the years in question.

2. That it was error to refuse to instruct the jury on the law applicable to predatory and coercive pricing and refusal to deal.

3. That it was error to refuse to present the jury with the question of whether plaintiffs' claim was barred by the statute of limitations.

4. That the court erred in massive exclusions of evidence for the defense, in that the court (a) failed to allow Champlin to deny accusations against it; (b) precluded Champlin from proving its economic incapacity to rig the market; (c) precluded Champlin from refuting predatory pricing claims; (d) precluded Champlin from challenging the Caldwell calculations.

5. That it was error to foreclose Champlin's use of depositions of parties and managing agents.

In general it is also argued by Champlin that it suffered from the prejudice and animosity shown by the trial judge toward it. From the examination of the record we do not believe that the latter claim has any justification whatsoever. The record discloses that the judge was very patient indeed with Champlin's lawyers. It is true that he ruled against them in many instances but in many instances he was fully justified in doing so.

DEFINITION AND EVIDENCE IN SUPPORT OF CONTENTION OF PLAINTIFFS THAT DEFENDANT WAS GUILTY OF PRICE FIXING

Section 1 of the Sherman Act provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations, is declared to be illegal. . . .

Price fixing agreements are per se violations of § 1 of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978); *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940), reh. den. 310 U.S. 685, 60 S.Ct. 1091, 84 L.Ed. 1421; *Bryan v. Stillwater Board of Realtors*, 578 F.2d 1319 (10th Cir. 1977); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979); *United States v. Sigma*, 1980—1 Trade CAS. ¶ 63,097 (4th Cir. 1979).

If the defendants' purpose was to fix prices, it is not material that they had reasonable goals for doing so. *United States v. Socony Vacuum Oil Co., supra; United States v. McKesson and Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956). In *Socony-Vacuum Oil* the Supreme Court considered an alleged conspiracy to raise gasoline prices for the purpose of stabilizing the market. The Court found that the defendant's purpose was to fix prices, and the evidence showed that the conspiracy at least contributed to the rise in prices. The Court stated that the fact that other factors may also have contributed to the price rise was not material. It was held that even if the purpose of the conspiracy was to eliminate the evils within the system, with an aim of establishing more reasonable and more fair prices,

the conspiracy was nevertheless violative of the Sherman Act. The Court held there exists no justification for price fixing in a free economy. Therefore, the Court found that it was permissible to exclude evidence seeking to show the reasonableness of the conspiracy, since such evidence is irrelevant under the Sherman Act. The Court stated that an agreement among competitors to follow a practice of buying surplus gas on the spot market for the purpose of preventing prices from falling sharply was unlawful, regardless of how reasonable it was believed to be, even though there was not shown to be a direct agreement among the conspirators in the actual prices which were being maintained.

In *McKesson and Robbins, supra,* the Supreme Court said:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease prices.

76 S.Ct. at 940. The Supreme Court further stated:

> Congress has marked the limitations beyond which price fixing cannot go. We are not only bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy. (citation omitted).

Id. at 943-44.

Illegal price fixing includes informal and indirect, as well as formal and direct, agreements to exchange price information or fix prices. *Catalano, Inc. v. Target Sales, supra; United States v. Container Corporation of America, supra.* In *Catalano,* the charge was that respondent wholesalers secretly agreed to sell to retailers only if pay-

ments were made in advance or upon delivery. That is, the wholesalers agreed to limit all credit sales, whereas before the agreement the wholesalers had competed with one another in regard to the granting of credit and the terms thereof. The majority of the court of appeals held that the agreement to withhold credit did not constitute price fixing. The dissent disagreed on the ground that the extension of interest free credit is an indirect price reduction, and elimination of such credit was thus a method of raising prices. The Supreme Court agreed with the dissent, and reversed the decision of the court of appeals. The Supreme Court stated that the mere fact that a practice entailing a risk of obvious anticompetitive impact "may turn out to be harmless in a particular set of circumstances will not prevent it being declared illegal per se." 100 S.Ct. at 1928.

Furthermore, in *Container Corporation of America, supra*, the defendant's activity included an agreement to exchange price information, but no agreement to adhere to a price schedule as in *United States v. Socony-Vacuum Oil Co., supra.* The Supreme Court's holding was that the result of this reciprocal exchange of price information was to stabilize prices, since when one competitor received knowledge of another competitor's price, he ordinarily matched that price. The holding was that this reduction of price competition constituted price fixing. The Court said "[p]rice is too critical, too sensitive a control to allow it to be used in even an informal manner in order to restrain competition." 89 S.Ct. at 513. *See also, American Column and Lumber Co. v. United States*, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921).

The Supreme Court's strict enforcement of the prohibition against suppressing competition is emphasized in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). There the Court held that an agreement among competitors to refuse to discuss prices with customers

until after negotiations had resulted in the selection of an engineer restricted trade within the meaning of § 1 of the Sherman Act. The Court reached this conclusion even though the defendant's activity was not express price fixing. Thus the ruling was that the agreement operated as an absolute ban to competitive bidding, as a result of which customers were deprived of the ability to compare prices when selecting engineering services.

It has also been held that price fixing can be shown by direct or circumstantial evidence. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Edward J. Sweeney and Sons v. Texaco*, 637 F.2d 105 (3rd Cir. 1980); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977). In *Interstate Circuit*, the Supreme Court stated that "[i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous agreement on the part of the conspirators." *See* 306 U.S. at 227, 59 S.Ct. at 474. In *Sweeney*, the court held that direct proof of an express agreement is not a requisite, that the plaintiff may rely on an inference of a common understanding drawn from basic evidence, although not from mere speculation.

It is also a requisite that the evidence is to be considered as a whole to determine whether a price fixing conspiracy existed and whether defendants were part of that conspiracy. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962); *Cackling Acres v. Olson Farms, supra.* In *Cackling Acres* it was said by this court that "a conspiracy must be judged by its constituent parts and the jury must look at the alleged conspiracy in its totality. A conspiracy may be implied by a course of conduct and other circumstantial evidence." 541 F.2d at 245. This proposition is somewhat fundamental. However, it is entitled to be particularly considered in the case at bar

because much of the evidence deals with the raising of prices rather than the lowering of prices. Yet, the fact that there was a secret and well organized effort to fix prices certainly establishes that the defendants were engaged in both as part of the whole scheme. Thus, both the direct and circumstantial evidence in this case overwhelmingly supports the plaintiffs allegations that there was price fixing. A summary of the evidence shows without question that this is true.

One of the witnesses, Dea Entriken, who was formerly assistant Regional Manager of Product Pricing at Champlin, testified at some length that his job at Champlin required him to call competitors and arrange to pull their CPAs and raise the retail price of gas to a certain level at a certain date. Two of Champlin's competitors, Jim Ozment and Robert Alves, also testified to talking with Entriken on the phone for that purpose. Becky Rhoads, who was one of Champlin's pricing clerks, testified that Entriken and his immediate supervisor, Dewey Mason, Champlin's Regional Manager of Product Pricing, were talking to competitors on the phone and were agreeing on prices. Gail Campbell, another of Champlin's pricing clerks, testified that Entriken and Mason were talking with others on the phone in an effort to restore the gas market to normal.

Records which were kept by Entriken during the course of his employment at Champlin, including notes made while he was talking on the phone, revealed his conversations with competitors on the matter of setting future prices. The notes showed such statements as "all are committed," and such and such a company "will move to 31.9," and these companies "will 31."

There was a "talk/no talk" document which had been prepared by Mason and given to Entriken. Entriken testified that the purpose of this document was to distinguish those competitors it was safe to talk with about prices, because they would maintain the confidentiality of

the conversations, from those Entriken should not talk with for the opposite reason. Bob Parker of FINA was originally on the "no talk" column. Later, Mason gave Entriken a note which said it was now okay for Entriken to talk to Parker. Entriken testified that after receiving that note he talked with Parker about future price moves.

Mason himself testified that he spent a great deal of time talking to competitors, in an effort to find out what was happening in the market. Mason, however, denied giving and receiving specific information about future price moves.

Entriken and Mason each had approximately 500-1200 phone conversations per month with competitors.

The evidence showed price uniformity between Champlin and its competitors during the relevant period.

Fred King and Sam Olson, King's former supervisor, testified that Champlin and its co-conspirators called them many times to attempt to convince King to eliminate its spot, and King refused.

This evidence strongly supports King's claim that Champlin was involved in a collusive effort to attempt to force King to eliminate its spot by first bringing prices down, and then agreeing to bring prices up, so that King could not sell gas at optimum prices. *See also, United States v. Sigma, supra,* and *Phillips v. Crown Central Petroleum Co.*, 602 F.2d 616 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1021, 62 L.Ed.2d 756 (1980), where plaintiffs made similar claims to the claims at bar. The courts held that the evidence was sufficient to show a price fixing conspiracy. The evidence of price fixing in the latter cases was not as strong as the evidence in the case at bar.

This legal and factual background provides the basis for proceeding to address Champlin's contentions on this appeal.

ARE THE CLAIMS OF THE PLAINTIFFS BARRED BY THE STATUTE OF LIMITATIONS?

Section 4B of the Clayton Act, as amended, (15 U.S.C. § 15b) requires that antitrust actions be commenced within four years of the date the cause of action accrued. The complaint here in question was filed on October 2, 1975. Defendant-appellant maintains that a percentage of the plaintiff's claims which arose prior to October 2, 1971 were barred by the statute of limitations, or, in the alternative, that the question should have been submitted to the jury. It is the position of the plaintiffs that there has been fraudulent concealment through the undercover actions of the defendant-appellant and that this tolls every federal statute. *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946); *Public Service Co. v. General Electric Co.*, 315 F.2d 306 (10th Cir. 1963), *cert. denied*, 374 U.S. 809, 83 S.Ct. 1695, 10 L.Ed.2d 1033; *King and King Enterprises v. Champlin Petroleum Co.*, 446 F.Supp. 906 (E.D. Okl. 1978). The allegation to the effect that Champlin and its co-conspirators were guilty of fraudulent concealment of their illegal conduct and of their conspiracy is set forth with particularity in the complaint.

In *Ashland Oil Co. of Cal. v. Union Oil Co. of Cal.*, 567 F.2d 984, 988 (T.E.C.A., 1977), *cert. denied*, 435 U.S. 994, 98 S.Ct. 1644, 56 L.Ed.2d 83 (1978) the court said:

> [w]here acts causing injury are fraudulently concealed from the injued party or where fraud furnishing the basis of an action is of such nature as to conceal itself, a statute of limitation is tolled until the injured party discovers, or with due diligence could have discovered, the injury. (citations omitted). It is clear, however, that mere ignorance on the part of a plaintiff is not sufficient. (citation omitted.)

The Temporary Court of Appeals further said that to prevail on its claim that the statute of limitations was tolled, plaintiff "would have to establish either that the defendant fraudulently concealed the conduct forming the basis of the claim or that the defendant's conduct by reason of its fraudulent nature was inherently self-concealing."

In our case both parties agree that the district court, in an earlier proceeding involving this case, correctly stated the applicable law. The court's language is as follows:

> The party asserting the fraudulent concealment doctrine has the burden of showing (1) the use of fraudulent means by the party who raises the ban of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action. (citations omitted)
>
> . . . .
>
> [O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. (citation omitted).

King and King Enterprises v. Champlin Petroleum Co., supra, 446 F.Supp. at 911. The district court also said:

> A denial of an accusation of wrongdoing does not constitute fraudulent concealment. *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F.Supp. 546, 549 (N.D. Ohio, 1974), aff'd, 523 F.2d 389 (6th Cir. 1975). The statute of limitations is not tolled on

> account of a party's failure to discover, *Public Service Co. v. General Electric Co.*, 315 F.2d 306, 310 (10th Cir.), *cert. denied*, 374 U.S. 809, 83 S.Ct. 1695, 10 L.Ed.2d 1033 (1963), and, in the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment. *Kansas City v. Federal Pacific Electric Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed. 171 (1962); *Burnham Chemical Co. v. Borax Consolidated*, 170 F.2d 569, 577 (9th Cir. 1948), *cert. denied*, 366 U.S. 924, 69 S.Ct. 655, 93 L.Ed. 1086 (1949); *Dayco Corp. v. Firestone Tire & Rubber Co.*, 386 F.Supp. 546, 549 (N.D. Ohio 1974), aff'd, 523 F.2d 389 (6th Cir. 1975). *See, Laundry Equipment Sales Corp. v. Borg-Warner Corp.*, 334 F.2d 788, 792 (7th Cir. 1964); *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 87 (2nd Cir.), *cert. denied*, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961).

Id. at 912.

The question is whether the evidence established fraudulent concealment as a matter of law. The conclusion we reach is that the evidence overwhelmingly supports the proposition that all price fixing activity was concealed by Champlin. It appears from the record that Mr. Dewey Mason, Champlin's Regional Manager of Product Pricing at the time, prepared a document with two columns of names. One of these was entitled a "talk" column, and contained names of persons to whom they could speak, and the second column was entitled a "no talk" column. The witness Entriken testified that the purpose of the "talk/no talk" document was to separate the names of the reliable people from the names of those who were unreliable, in that they could not keep a confidence. Entriken testified that he was given the document so that he would not place calls to the wrong

people. He also testified that he often made his price fixing calls after normal working hours, and that Champlin's price fixing agreements were all made "under cover." In fact, Champlin's own witnesses, including William Biggersmith, a vice president at Champlin, Kenneth Richardson, Champlin's Regional Manager of Marketing Operations, and Mickey Bowles, Champlin's Manager of Product Pricing and Allocation, testified that any conspiracy which Champlin may have been involved in to fix prices of gasoline had been concealed. All of Kings' witnesses testified that they had not known of Champlin's price fixing activities. The evidence shows that knowledge of the price fixing conspiracy was not revealed to anyone connected with King until 1975, the year that the action was filed.

There is not one bit of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy, if the jury believed that a conspiracy did exist, had not been fraudulently concealed. Since there was no issue of fact for the jury to determine, the trial court correctly determined this issue as a matter of law. Hence Champlin's contention that this question should have been determined by the jury has neither merit nor substance.

Champlin maintains that the fact that King lowered its prices below its desired level where he could make a profit in order to meet predatorily low prices charged by Champlin and subsequently raised its prices above the desired level because of coercion by Champlin. Champlin claims that this is contradictory of any claim of fraudulent concealment. Champlin argues that since King knew that Champlin was lowering and raising prices in a manner alleged to be illegal, there was no fraudulent concealment. Champlin has missed the target. King did not claim at this trial that it was injured by virtue of predatory pricing. It claimed to have been injured as a result of a concealed conspiracy by Champlin and other co-conspirators to fix prices. Mere knowledge that

Champlin was raising and lowering prices does not provide knowledge that Champlain was agreeing with other members of the gasoline industry to fix prices. At the time that King was seeing the phenomena of lowering and raising of prices, he was not thereby notified that Champlin was fixing prices. The evidence pertaining to price fixing points to concealment of those activities.

It is true that where there is a dispute as to the existence of fraudulent concealment, the question is one for the jury. *See, Robertson v. Seidman and Seidman*, 609 F.2d 583 (2nd Cir. 1979); *Pan American Petroleum Corp. v. Orr*, 319 F.2d 612 (5th Cir. 1963); *Crummer Co. v. DuPont*, 255 F.2d 425 (5th Cir. 1958), cert. denied 358 U.S. 884, 79 S.Ct. 119, 3 L.Ed.2d 113. The evidence in this case shows no dispute over the question as to whether the price fixing activities of the defendant were concealed. In fact, the defendant's own employees testified that if there had been a price fixing conspiracy, it had been concealed. There was no indication in the record that plaintiff had been put on inquiry in any way of the defendant's price fixing activities. In the absence of a factual question for the jury to resolve, our holding has to be that the trial court correctly decided this issue as a matter of law. Both of the tests which were set forth in *Ashland Oil Co., supra*, were met here. The evidence showed that the defendant actively sought to conceal its price fixing activities, and the defendant's conduct, by reason of its fraudulent nature, was inherently self concealing.

WAS THE AWARD OF DAMAGES EXCESSIVE?

The allegation of the plaintiffs was that it suffered damages in the amount of $755,942 as follows: $270,919 for twelve operating gas stations; $302,352 for six planned stations that were never opened, and $182,641 for four stations that were closed. However, the jury awarded plaintiffs the sum of $1,205,942 (before trebling) which consisted of $450,000 in excess of the amount re-

quested. The trial court reduced the judgment by remittitur to $755,942 and trebled that amount pursuant to 15 U.S.C. § 15. The consequential total amount of damages was $2,267,826. Neither party appealed the remittitur action of itself. Champlin appeals the award of $755,942 prior to trebling on several grounds. One of these was that which we have already discussed, that a segment of the damages were barred by the statute of limitations. Additionally, Champlin maintains that the evidence does not support the damages and that the method employed by King's accountant, Grant Caldwell, to calculate damages was unreliable. Champlin argues that the Caldwell calculations should not have been admitted into evidence.

The law on establishing damages in antitrust actions has been well defined. First, it is necessary to show that there is a causal connection between the defendant's actions violative of the Sherman Act and the actual injury to the plaintiffs' business. Second, once the causal connection is established, it is necessary to quantify the amount of damages sustained by the plaintiff. Establishing damages in an antitrust action, therefore, involves a two step process.

With respect to the first step, the establishment of a causal link, the Supreme Court stated in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, 89 S.Ct. 1562, 1571, 23 L.Ed.2d 129, n. 9, as follows:

> [The plaintiffs] burden of proving the fact of damages under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

With respect to the second step, the quantification of damages, the Supreme court has stated that in antitrust cases a plaintiff is not to be held to a rigid standard of proof regarding the amount of damages, since in such cases economic harm is frequently intangible and difficult to quantify. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-65, 51 S.Ct. 248, 250-51, 75 L.Ed.2d 544 (1931). However, damages may not be merely speculative. There must be reasonable evidence from which a jury can rationally infer the amount of damages. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946). It is against this background that we must review the challenges of appellants.

Champlin's position that the award of damages should not be upheld is predicated upon three decisions which they have cited: *Gray v. Shell Oil Co.*, 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1973); *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2. 755 (1970); and *Continental Baking Co. v. Utah Pie Co.*, 396 F.2d 161 (10th Cir. 1968), *cert. denied*, 393 U.S. 860, 89 S.Ct. 136, 21 L.Ed.2d 128. In all of these cases, the courts held that there was an inadequate evidentiary basis for quantification of the plaintiffs' damages. On that ground the courts held that damages based on the accountant's calculations could not be upheld.

In *Gray*, the figures which the accountant was given by the plaintiffs as a basis for his calculations of lost profits were based on plaintiff's "feelings" that they were entitled to additional margins of profit, and the purely speculative claim that their retail gas prices could have been raised six cents per gallon without any resultant loss in the volume of gasoline sales.

In *Hawaiian Oke*, the figures relied upon by the accountant in determining losses were found to have

been expressly contradicted in the record. In addition, the accountant in *Hawaiian Oke* based his calculations of lost profits partially on a projected growth rate.

In *Utah Pie* the exhibits relied on by the accountant in computing lost profits against one of the defendants were found to have "presented a clearly erroneous factual foundation for the computation of damages." 396 F.2d at 191. Moreover, it was found by this court that the evidence showed that plaintiffs' damages were not caused by Sherman Act violations of the defendants, but were caused by other reasons altogether. Therefore, it was concluded that plaintiffs' claims for damages for injury to its goodwill were based on mere hypothetical predictions.

In our judgment, Champlin's reliance on these cases is inadequate and misplaced. A reading of the record in the case clearly indicates that the evidentiary problems present in *Gray*, *Hawaiian Oke* and *Utah Pie* are not present here. We will, however, discuss the evidence with respect to each of the plaintiffs' claims for damages and the mode of calculating damages for each claim.

A. *Discussion of the Damages Claimed for the Twelve Operating Stations*:

Plaintiffs' alleged damages to twelve operating service stations from January 1, 1972 through March 31, 1973 growing out of the price fixing activities of the defendant. At the beginning we note that this claim for damages is entitled "the predatory and coercive pricing" claim. This is a misnomer. It has been determined that all of the evidence presented and all of the instructions to the jury were on price fixing alone. There remains no question that the jury would not have understood this phrase to refer to price fixing. The jury was never presented, or confronted with, the subject of predatory pricing; it would have no reason to assume that phrase meant anything other than price fixing. All the evidence that they saw and heard went in to price fixing.

Our inquiry into whether a causal connection has been established regarding the price fixing claim has been addressed previously. It is sufficient to say that there was an overabundance of evidence from which the jury could reasonably have concluded that the defendant was engaged in price fixing, and that such activity injured the plaintiffs in their operating service stations. Our sole inquiry into plaintiffs' first claim for damages, therefore, concerns the quantification of those damages.

The method of calculating damages to the twelve operating stations for the relevant period was as follows: The accountant, Caldwell, based his calculations on the daily sales records, the monthly profit and loss statements, and other records of King's gas stations. The established damages for each operating station were calculated in this manner:

The average profit margin per time shift, that is, the retail price of gasoline sold less the cost of that gasoline, was calculated for those periods of time during which the plaintiffs were selling gasoline at the desired prices (29.9 and 30.9 for regular gas; 31.9 and 32.9 for premium gas). Those margins were measured against the average margin per shift realized when plaintiffs were selling gas at other than the desired prices. The figures computed for the average margin per shift when plaintiffs were selling at prices other than the desired prices were subtracted from the figures computed for the average margin per shift when plaintiff was selling at the desired prices. The differential for each station was multiplied times the number of shifts in calculating the estimated damages from lost profits due to defendant's price fixing activities. Profits and estimated losses of each station were compared only against the station's own actual performance. One station was not measured against any other station. Where records were incomplete, they were disregarded. No growth projections of future earnings were made. The total damages for this claim were thus estimated as follows:

Store No.	Regular	Premium	Total
1	$ 29,820	$19,578	$ 49,398
2	9,421	5,305	14,726
3	22,350	12,918	35,268
4	33,271	15,607	48,878
5	36,555	14,903	51,458
9	4,918	5,503	10,421
10	3,610	4,141	7,751
11	6,279	8,675	14,954
12	5,307	1,300	6,607
13	17,108	2,641	19,749
14	5,851	4,531	10,382
15	757	570	1,327
Totals	$175,247	$95,672	$270,919

The sum total of damages claimed for the twelve stations was $270,919.

It is our view that this method of computing damages is reasonable. Unlike the cases relied upon by Champlin, *supra*, the evidence in this case fully supports the reliability of the figures used as a comparative basis for calculating lost profits, no speculative projected growth rates were incorporated into the calculations of lost profits, and, as previously mentioned, the evidence fully supports the jury's verdict that defendant's price fixing activities were the cause of any damages suffered by King's operating stations during the relevant period.

As was said by this court in *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977), once there is found to be sufficient factual evidence of damages, the plaintiffs are not obligated to establish the quantum of damages "with mathematical precision so long as the extent of such damages was not left to jury speculation." 541 F.2d at 246. If the calculations upon which the loss of profits are based are estimated in any reasonable way and the underlying assumptions on which the accountant relied are not without support in the record, the calculations may be upheld as a valid means of measuring loss of profits. *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561 (10th

Cir. 1961), *cert. denied*, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962). *See also, Tire Sales Corp. v. Cities Service Oil Co.*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981); *Trabert and Hoeffer, Inc. v. Piaget Watch Corp.*, 633 F.2d 477 (7th Cir. 1980); *Woods Exploration and Producing Co. v. Aluminum Co. of America*, 509 F.2d 784 (5th Cir. 1975), *cert. denied*, 423 U.S. 833, 96 S.Ct. 59, 46 L.Ed.2d 52; *Terrell v. Household Goods Carriers Bureau*, 494 F.2d 16 (5th Cir. 1974); *cert. denied*, 419 U.S. 987, 95 S.Ct. 246, 42 L.Ed.2d 260; *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929, 95 S.Ct. 1128, 43 L.Ed.2d 400 (1975); *Locklin v. Day Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020, 91 S.Ct. 582, 27 L.Ed.2d 632 (1971); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904, 86 S.Ct. 239, 15 L.Ed.2d 157.

In the Fifth Circuit decision in *Malcolm v. Marathon Oil*, 642 F.2d 845 (5th Cir., 1981), an independent gasoline retailer, an admitted price cutter during the period from 1965-1972, sought damages from the defendants for antitrust violations. The district court directed a verdict against the plaintiff because it found that Malcolm's evidence was insufficient on the fact of injury and the amount of damages. The Fifth Circuit reversed the opinion of the district court. It limited its review solely to the question of whether the plaintiff had presented sufficient evidence of injury in fact and the amount of damages to warrant submission of the case to the jury. The issue in *Malcolm* was predatory pricing, rather than price fixing. However, when determining whether the evidence warranted submission to the jury on the question of injury in fact, the court stated that the plaintiff had "sufficiently shown that his profit maximizing price was greater than the low market price effectively set by the conspirators in those specific cases of unnaturally low prices testified to . . . ." 642 F.2d at 857, n.22. The

court noted that by offering proof that the price was below what Malcolm, "in his business judgment, obviously believed was his profit maximizing price in the competitive market . . . [Malcolm] offered proof that he was injured by these low prices." The court went on to state that, having provided sufficient evidence of injury in fact, the question of the amount of damages should also be presented to the jury, since "the antitrust plaintiffs burden of proving the amount of damages is lighter than the burden of proving injury in fact . . . [and] it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 858.

In *Malcolm* the plaintiff had contended that, absent collusion by the defendants, a "normal" price for gas prevailed in the gasoline market, and the plaintiffs' practice was to price approximately two cents below the "normal" price of other independents. The court held in *Malcolm* that the plaintiff could rely upon the "normal price" as a benchmark for establishing damages due to predatory pricing. We agree and hold that the plaintiff herein should be permitted to rely upon the "normal price" as a benchmark for establishing damages as a result of price fixing. To hold differently would be to preclude antitrust plaintiffs from prevailing, even when a per se violation of the Sherman Act is present, since there is no absolutely "sure" way of establishing damages in such cases. Thus, this would defeat the entire purpose of the antitrust laws.

Based on the record, then, and the foregoing authorities, it is our holding that the method of estimating damages as to plaintiffs' first claim was not erroneous.

B. *Are the Plaintiffs Entitled to Recover Damages Growing Out of the Closing of the Four Stations?*

As indicated, plaintiffs claimed damages for commissions and profits lost for four stations which allegedly

were closed as a result of the defendant's price fixing activities. The four stations included one in Tulsa, one in Oklahoma City, one in Stillwater, Oklahoma, and one in Mountainburg, Arkansas. The latter station was only closed in 1973 for a total of 5/8th of the period in question (1972-1975). The three Oklahoma stations were closed prior to 1972, and thus were closed for the entire period in question.

Following our foregoing analysis, before discussing the method of quantifying damage, it is necessary to ask whether the evidence supports a factual assumption that the stations were closed because of the alleged activities of the defendant. As previously noted, unless the record supports a finding of such causal connection the method of quantifying damages becomes academic and irrelevant.

The record does show that Carl King gave testimony that the four stations were required to close because of lack of profitability. Sam Olson and Fred King both testified that these stations were closed because of the price disturbances caused by the price fixing activities of the defendant. The jury may have reasonably inferred from this testimony that the stations were closed because they were unprofitable, and that they were unprofitable because of the collusive activities of the defendant. Mr. Olson testified the reason the stations were closed was that King could not maintain a volume of sales at a high enough price to make money, and that the defendant's actions were responsible for this fact. Fred King testified that the stations were closed because of the depressed prices in the area, and that there was a definite correlation between the depressed market and the defendant's overall price fixing scheme. Based on the evidence, therefore, it is not to be said that there was an insufficient basis in the record in support of the assumption that these four stations were closed because of the defendant's illegal actions. Indeed, there was no evidence in the record to indicate that the stations had closed for any other reason.

We next consider the question of whether Caldwell's methods of quantifying the damages withstands judicial examination and scrutiny. Mr. Caldwell calculated the estimated damages for loss of profits and commissions due to the closing of these four stations as follows: Three of King's operating stations, Admiral Place in Tulsa, North May in Oklahoma City, and a station in Bethany, Oklahoma (numbers 1, 4 and 5 on the list of twelve operating stations above), were chosen as comparatives, or representative stations. Mr. Caldwell used the net profits of those stations for 1972-75, as reflected in the books and records of the stations, and added to that a portion of the claim for each of those stations under the damages alleged to have been sustained by the twelve King stations in operation due to the price fixing activities of the defendant for 1972 and three months of 1973. The total of these figures was divided by four, since the damages were alleged for a period of four years, from 1972-1975. This figure was then multiplied by 3⅝ths, to reach a profit average representative of each of the four gas stations, having an actual total closing time of 3⅝ths of the four years. In calculating the actual profits of the three comparison stations, Mr. Caldwell acted conservatively. For example, the Admiral Place station actually operated for approximately one month only in 1975, and realized a loss, rather than a profit, of $2,746. This loss was included in (i. e. subtracted from) the actual average profits realized by the stations for the four years. The actual figures were as follows:

	Station			
	Admiral Place	North May	Bethany	Total
1972 Actual Net Profit	$ 2,011	$ 7,472	$11,707	$ 21,190
1973 Actual Net Profit	(46)	6,161	6,875	12,990
1974 Actual Net Profit	9,554	4,027	6,373	19,954
1975 Actual Net Profit	(2,746)	2,507	5,768	5,529

Additional profits based on pricing damage claim within above year	10,539	18,496	17,527	46,562
	$19,312	$38,663	$48,250	$106,225
Four year average per station				35,408
Number of stations closed				3 5/8
Damage claim				$128,354

In addition, Caldwell separately computed the average annual commission that the individual stations paid King Enterprises for each gallon of gas purchased, in order to calculate the estimated loss of commissions to King. This figure was excluded from the prior computations, and was not used in figuring the prior claims for damages; therefore, there was no duplication of damages. The two figures were separated for clarity. The total gallons of gas sold by the three comparison stations was obtained for the years 1972-1975. Data for the Admiral Place station for 1975 was not available, and the time period in computing average gallons sold was adjusted accordingly. An average annual commission of ½ cent per gallon was multiplied by the average annual gallons per station to arrive at annual average commissions lost for each of the four stations. This figure was multiplied by 3⅝ths. The calculations were as follows:

	Station			
	Admiral Place	North May	Bethany	Total
1972 Gallons	686,035	926,225	1,081,068	2,693,328
1973 Gallons	439,989	660,389	630,183	1,730,561
1974 Gallons	638,746	583,964	753,702	1,976,412
1975 Gallons	—	960,094	881,520	1,841,614
	1,764,770	3,130,672	3,346,473	8,241,915
Months	36	48	48	132
Average gallon per month	49,021	65,222	69,718	62,439
Average per year				749,268
Commission @ ½¢ per gallon per year				$ 3,746
Times 4 years				$14,984
Number of stations closed				3 5/8
Damage claim				54,317

The total damages claimed for the four closed stations was, thus, $182,671 ($54,317 for loss of commissions and $128,354 for loss of profits).

The question is whether use of these three stations as comparatives for the four closed stations is reasonable. Champlin contends that there is no evidentiary basis upon which to reach the conclusion that the closed stations would have been equally as profitable as the three comparative stations. Such evidence could not be in the record, however, since there is no way of establishing "what might have been." This court has thoroughly explained the rationale to be followed in cases where it is impossible to prove the non-provable. *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973), *cert. denied*, 414 U.S. 975, 94 S.Ct. 290, 38 L.Ed.2d 218.[1]

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[1] Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 51 St.Ct. 248, 250, 75 L.Ed. 544.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed. 652.

This position was recently reaffirmed by the Supreme Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). It has been otherwise stated: '. . . having thus established the factum of damages, the amount thereof may be fairly approximated by the jury.' *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.). Also: '. . . When wrongdoers, by their very actions, make it virtually impossible to prove damages precisely, they should not be heard to complain of the method of proof, if the method allowed by the trial court is reasonable under the facts and in the circumstances of the case.' *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 245 (5th Cir.).

476 F.2d at 111.

There was evidence in the record from which the jury could have reasonably assumed that King's closure of the four stations was caused by the actions of the defendant. If the jury did so find, therefore, that the defendant's illegal activities led to the closing of the stations, the inability to prove exactly what profits the closed stations would have realized if they had not closed should not preclude the plaintiff from recovering.

Champlin's expert witness called to rebut the damage study prepared by Mr. Caldwell, Dr. Richard H. Leftwich, was permitted to testify at length that the assumption that the four closed stations would realize profits equal to the three metropolitan comparative stations, and the assumption that King could have sold at the optimum level of pricing if the stations had remained open, were economically unsound. Champlin's officers, Mr. Biggersmith and Mr. Richardson, also testified to that effect. Thus, the jury was free to believe that version of the study, if it decided to do so. Additionally, the trial court instructed that the jury was to give the expert testimony that weight which it deemed relevant and proper and decide whether the experts' opinions were sound. So the jury was specifically told to analyze this testimony of the plaintiff and the rebuttal by the defendant. There was a specific instruction as to the accounting data which stated "if you feel that these compilations or summaries do not reflect, or are in conflict with, the underlying data which has been admitted into evidence, you may disregard such compilations or summaries, to the extent that they are not supported by the evidence." The jury was thus free to accept or disregard Caldwell's damage study and to accept or disregard Leftwich's conclusion that the study was based on economically unsound assumptions. The jury, of course, resolved this matter in favor of plaintiff.

Dr. Leftwich testified that he knew of "no better way to measure damages at the moment." We have no dis-

agreement with that statement. No better way of measuring damages has been revealed to this court, either, and thus we are disinclined to disregard the jury's decision. True, King's least profitable stations, rather than its most profitable ones, could have been used as comparatives. However, the answer to that is that the jury had the entire picture before it and it could have taken that into account in reaching its verdict; it could have rejected damages in that amount if it so chose.

The weight and probative value of Caldwell's and Leftwich's testimony was for the jury to decide. *Atlas Building Production Co. v. Diamond Block and Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, 80 S.Ct. 1608, 4 L.Ed.2d 1727 (1960). *See also, Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966). As stated in *Trabert v. Hoeffer, Inc., supra*, 633 F.2d at 484 ". . . in its damage assessment the 'fact finder may act on probability and inference . . . . Even though we may not agree with each step in the [fact finders] reasoning process, we must affirm . . . unless the findings are beyond the pale of sane judgment' (citation omitted)." We hold that the findings of the jury in the case at bar are not excessive. The damages awarded for plaintiffs' second claim are not clearly erroneous.

C. *Were the Plaintiffs Entitled to Claim Damages for the Six Stations That Were on the Drawing Board, So to Speak, But Were Never Opened?*

King's claim in this regard arises by virtue of the fact that it had planned to open six stations in Blackwell, Enid, Guymon, Boise City and Woodward, Oklahoma, and Liberal, Kansas, but that its plans were changed because of Champlin's illegal price fixing and the resultant depressed market. The evidence pertaining to this claim is very weak.

Olson testified that he looked at the stations in Blackwell, Woodward and Liberal, and that he looked at the prospective station in Enid and talked with the owner and her attorney. Olson and Carl King both viewed the prospective stations in Guymon and Boise City and talked with the operators. Mr. Olson and Mr. Fred King testified that the company believed that it was unable to open these planned stations due to the depressed markets, and that the depressed market condition was due to Champlin's price fixing. However, Carl King testified that the failure to open the six planned stations was due to a lack of supply of gasoline. Mr. Olson also testified to that effect. We have noted several times that failure to supply or refusal to deal was not at issue in this case. Defendant was unable to rebut such a claim, and the issue was not presented to the jury. Therefore, damages may not be awarded in this case for failure to supply or refusal to deal.

The claim for damages due to price fixing based on King's failure to open the six allegedly planned stations is not supported by the plaintiffs' own testimony. At most, the evidence shows conflicting allegations by the plaintiffs and Mr. Olson. This evidence is certainly not sufficient to warrant an award of $302,352 in actual damages, or $907,056 after trebling. We hold, therefore, that this portion of the decision below must be reversed. The jury's award of $755,952 must be reduced in the amount of $302,352, the amount awarded for the six planned stations that never opened, to reduce the total amount of the actual damage award to $453,590. Trebling that amount pursuant to 15 U.S.C. § 15 reduces the total damage award to $1,360,770, rather than $2,267,826 as awarded below.

D. *Refusal of the Court to Accept in Evidence the Depositions of Carl King, Sam Olson and Dea Entriken as Substantive Evidence to Their Testimony Notwithstanding that All Three Were Present and Testified at the Trial*

The defendant sought to read the depositions of the three above named persons in their entirety during the trial. The trial court refused to permit this.

Rule 32(a)(2) of the Federal Rules of Civil Procedure provides that a deposition of a party or his managing agent may be used by an adverse party for any purpose. This rule applies to the depositions of the plaintiff, Carl King, and his managing agent, Sam Olson. As to Entriken, it does not have the same application. While Entriken has been named as a third party defendant by the defendant-appellant, that does not make him a party in the case on appeal here.

The fact that Entriken was not a party at the time his deposition was taken does not render the rule inapplicable to Entriken, however. Rule 32 specifies that insofar as the rule applies to agents, the agent must have been an agent at the time the deposition was taken. The Rule does not state that the party must have been a party at the time his deposition was taken. The policy reasons for requiring that an agent must have been an agent at the time his deposition was taken are cited in 4A, J. Moore's Federal Practice, § 32.4, p. 32-18 (1981) as follows: 1) If the agent had ceased to be an agent of the party at the time of the deposition, he may have been hostile toward the party at that time, and thus it would be unfair to allow his testimony to be used as an admission against the party; and 2) at the time of the deposition the non-agent did not represent the party, and thus could not bind the party. These policy reasons do not apply to a party, however, and thus the fact that Entriken was not a party at the time his deposition was taken is irrelevant.

As far as Mr. Entriken's deposition is concerned, Rule 32 is not relevant as far as this appeal is concerned, since Entriken was not a party in the case between Champlin and King but only in the case between Champlin and Entriken. Thus, the failure to permit the deposition to be used as an admission of Entriken is not relevant to this appeal. Since the case between Champlin and Entriken is not on appeal here, the failure of the trial court to allow unrestricted use of Entriken's deposition is irrelevant to this appeal, and could not constitute reversible error in order to reverse the case between Champlin and King.

We are faced with a different problem, however, in connection with the depositions of Carl King and Sam Olson. Under Rule 32 a party may introduce "as a part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there. . . . [T]he Rule is a restatement of the long recognized rule of evidence that statements of a party which are inconsistent with this claim in litigation are substantively admissible against him." *Community Counseling Service, Inc. v. Reilly*, 317 F.2d 239, 243 (4th Cir. 1963). *See also, Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978); *Zimmerman v. Safeway Stores, Inc.*, 410 F.2d 1041 (D.C. Cir. 1969). However, the situation in the case at bar was not as open and shut as the appellee would like to have it.

We are not denying that the trial court excluded the depositions as a whole as admissions. He did, and this was not expressly in accordance with the Rule. However, in line with our statement a moment ago, the Rule is not open and shut in practice. The trial court has a perfect right to limit the use of the material if it is repetitious or immaterial (*See Fey v. Walston and Co., Inc.*, 493 F.2d 1036 (7th Cir. 1974)), or where the depositions do not add any information to that given in oral testimony

by the deponents or the information is irrelevant. *Fenstermacher v. Philadelphia National Bank*, 493 F.2d 333 (3rd Cir. 1974); *Pursche v. Atlas Scraper and Engineer Co.*, 300 F.2d 467 (9th Cir. 1962), *cert. denied*, 371 U.S. 911, 83 S.Ct. 251, 9 L.Ed.2d 170.[2] A further limitation

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[2] The *Pursche* case is an authority which is cited by the defendant-appellant in its opening brief supporting its contention that the trial court erred in excluding depositions of Mr. King and his manager, Mr. Sam Olson. It is quite true that the United States Court of Appeals for the Ninth Circuit stated the general rule. The court did not reverse the case on that ground, however, and the language of the court is significant because it is fully applicable here. The Ninth Circuit said:

> We do not mean to sanction the practice of indiscriminately offering an entire deposition or encourage any attempt to thus impose upon the court. In *Merchants Motor Freight v. Downing, supra* [227 F.2d 247 (8th Cir. 1955)], the court stated the deposition of a party might be admitted 'subject to the court's right to exclude such parts thereof as might be unnecessarily repetitious in relation to the witness' testimony on the stand.' No doubt that procedure has merit but we believe as a general rule the better practice is for the court in the first instance to require counsel to specify the particular portions that are deemed relevant and to limit the offer accordingly. Cf. *United States v. United Shoe Machinery Corp.*, 93 F.Supp. 190 (D.C. D.Mass. 1950).
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> But the record does not demonstrate that the error was prejudicial. On three occasions Atlas examined Pursche as an adverse party pursuant to Rule 43(b); the examination covered many matters involved in the action and was not limited by the court; the last of Pursche's appearances followed Atlas' unsuccessful attempt to introduce his depositions. Atlas then interrogated Pursche, covering various matters appearing in the deposition and his testimony concerning them, and at no time did Atlas offer to prove that Pursche's testimony at the trial fell short of any appearing in the depositions. 28 U.S.C.A. § 2111; *McKee v. Jamestown Baking Co.*, 198 F.2d 551 (3rd Cir. 1952); *Watts v. Holland*, 153 F.2d 337 (9th Cir. 1946); *Davis v. R. K. O. Radio Pictures*, 191 F.2d 901 (8th Cir. 1951).

300 F.2d at 488.

It should be said, thus, that the Ninth Circuit was very careful to point out that the trial judge has discretion with respect to

is the discretion of the court; the handling of depositions is peculiarly vested in the discretion of the trial court. *Reeg v. Shaughnessy*, 570 F.2d 309 (10th Cir. 1978); *Sims Consolidated, Ltd. v. Irrigation Power Equipment, Inc.*, 518 F.2d 413 (10th Cir. 1975), *cert. denied*, 423 U.S. 913, 96 S.Ct. 218, 46 L.Ed.2d 141; *Campbell v. Barnett*, 351 F.2d 342 (10th Cir. 1965). As stated in *Reeg, supra*, "[o]bjections to receipt in evidence of depositional testimony, in whole or in part, may be made at trial for any reason which would require the exclusion of the evidence if the witness were present and testifying at trial." 570 F.2d at 316-17.

Undoubtedly the trial court erred in flatly ruling that the depositions of the parties could not be used as testimony. However, in addressing this question we note that the counsel for appellee did not select only portions of the depositions which he regarded as being admissions. He simply tendered the depositions in one bundle, and they run on and on. Certainly those portions that were repetitious or irrelevant could be excluded. As to those portions of the depositions which were not repetitious or irrelevant, it is impossible to see that any substantive rights of Champlin were affected by the court's refusal to allow these to be read, so that the jury's decision or verdict in this three and one-half week trial should be reversed. Champlin could easily have questioned Olson and Carl King in the matters it wished to introduce, for

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acceptance of such depositions. If it were a short deposition that contained a clear cut admission, it would be plain error, no doubt, to refuse to accept it because its relevancy would be apparent. In the case at bar, however, counsel just wished to offer the depositions lock, stock and barrel, which is one other reason justifying the failure to accept them. In any event there is a good deal of justification for rejecting the tender inasmuch as there was no way for the court to know, without the aid of counsel, which parts were material or useful. Thus, this matter should be resolved in the case at bar the same way it was resolved in *Pursche*.

example, and asked them whether they had made all these statements. But no such effort was made.

Champlin specifically objects to the court's refusal to permit the deposition of Olson to be read into evidence for the purpose of showing the invalidity of statements made during that deposition. However, Champlin could have questioned Olson on this matter and then used Olson's deposition for impeachment purposes inasmuch as the trial court expressly stated that it would permit those depositions to be used for such purposes. We fail to see why this court should reverse a decision in favor of Champlin's opponents merely because Champlin insists that it should have been allowed to utilize its own method of getting its point across, when another, at least equally effective method of getting that same point across was easily available.

Turning now to Champlin's claims of error having to do with the refusal of the trial court to admit other testimony in evidence, we find no merit whatsoever to any of Champlin's contentions. Many of Champlin's allegations of error go to evidence it wished to present in order to rebut claims of predatory pricing or refusal to deal, which were irrelevant to the issue at trial. There are some contentions that were raised by Champlin which deserve mention. These are:

First, Champlin maintains that error was committed by the trial court in failing to allow it to present evidence to prove its economic incapacity to rig the market. However, since market power is not relevant to a price fixing case under § 1 of the Sherman Act, the trial court did not err in refusing to admit such evidence. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956); *United States v. Socony Vacuum Oil Co., supra*, 310 U.S. at 224, n. 59, 60 S.Ct. at 845, n. 59.

Second, Champlin alleges that it was erroneously prevented by the trial court from refuting King's allega-

tions of causation between Champlin's illegal activities and King's inability to sell at its optimum price. We will address the two major contentions individually:

1) Jeff Smythe prepared an exhibit which attempted to show that King did not reduce prices to meet Champlin's prices, but that King reduced its prices below Champlin's prices. This exhibit prepared by Smythe, however, did not state the prices which Champlin's dealers were charging. That exhibit merely stated the prices that Champlin supposedly recommended to its dealers. The exhibit did not state what the actual sales prices were at the Champlin stations. Hence the trial court held that the comparative study failed to show what it purported to show and was thus misleading. The exhibit was actually comparing actual prices of King against theoretical or recommended prices of the Champlin dealers. Inasmuch as the Champlin dealers were shown to have been free to charge any price without following the recommended price, the court felt the exhibit was prejudicial and misleading. The court instructed defense attorneys that they were free to submit the exhibit in another form (i. e. so that the exhibit stated, without being misleading, what it was actually comparing.) This however, the defense lawyers refused to do.

The court did not abuse its discretion in refusing to admit the exhibit since it was misleading, especially since the court told defense counsel that it was free to present the exhibit in another, non-misleading form.

2) Sam Olson kept a diary recording price changes at the King stations and the reasons therefor. Defense witness Mickey Bowles prepared two exhibits which involved an analysis of that diary and purported to demonstrate that King only rarely reduced its prices to meet prices set by Champlin. The exhibits were objected to by plaintiff's counsel on the grounds that they only covered nine months of the forty month damage period, and as such were merely cumulative since the entire Olson diary had

been admitted into evidence, and that the documents could only compare actual prices charged by King with prices recommended by Champlin, since Mr. Bowles had already testified there were no records indicating actual selling prices of Champlin dealers. The objection was sustained.

We agree that the trial court acted within its discretion in refusing to admit these exhibits. Moreover, since the entire Olson diary, containing the same information, had been admitted into evidence, we fail to see how the exclusion was prejudicial to the defendant.

Third, Champlin maintains that the majority of King's claims were for damages for injuries suffered when Champlin had caused prices of gas to be lower than normal, whereas Entriken's testimony of price fixing went to efforts of Champlin to raise the prices of gas. King, however, alleged a complete scheme on the part of Champlin and its co-conspirators to fix prices. The issue was not purely a matter of lowering or increasing prices. The scheme involved both, first lowering the prices and later raising the prices in order to keep King off-balance and to prevent him from charging optimum prices for gas. While the direct evidence of price fixing went to the raising of prices, the circumstantial evidence was more than sufficient to raise the inference that the price fixing conspiracy involved the entire scheme. Champlin was, of course, free to present to the jury, by proper trial techniques, its theory that King had not suffered any damages by virtue of Champlin's efforts to fix prices.

Champlin states in its brief that it was precluded from reading Champlin's deposition testimony to the effect that the elimination of depressed prices would help, rather than hurt, King. All this testimony was not excluded. King was asked questions on the very topic at trial. He answered those questions and parts of his deposition were read at trial.

Finally, Champlin maintains that the trial court erred in refusing to allow it to question witnesses as to the truthfulness of another witness' testimony. The trial court indicated that in the interests of time it would be preferable for Champlin to question the witnesses on the subject matter itself, and then point out the contradictions. Champlin could have done this, or, in the alternative, could have merely rephrased the questions presented to the witnesses rather than ask them if, when such and such a witness said so and so, was that witness lying? We fail to see that Champlin's substantive rights were prejudiced by the trial court's refusal to allow him to ask questions in that form.

Our conclusion is that Champlin's claims of error due to the use of depositions and other evidence do not constitute grounds for reversal.

The judgment of the district court is, therefore, affirmed in part, and reversed in part. The $2,267,826 treble damages award is reduced to $1,360,770.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 75-276-C

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs,

vs.

CHAMPLIN PETROLEUM COMPANY,
Defendant and Third Party Plaintiff,

FRED DEA ENTRIKEN,
Third Party Defendant and Fourth Party Plaintiff,

vs.

MICKEY BOWLES and DEWEY MASON,
Fourth Party Defendants.

TRANSCRIPT OF PROCEEDINGS

May 14, 1980

Appearances:

For the Plaintiffs:

Richard W. Giauque, Esquire; Gary F. Bendinger, Esquire; James R. Holbrook, Esquire.

For the Defendant:

Cecil E. Munn, Esquire; Charles A. Zubieta, Esquire; A. Camp Bonds, Esquire; Mark C. Hill, Esquire.

[Tr. 3400] PROCEEDINGS

May 14, 1980

(IN CHAMBERS)

THE COURT: All lawyers here? Plaintiff.

MR. BENDINGER: Your Honor, there is a housekeeping matter that we would like to take care of first thing this morning. As the Court knows, Champlin earlier on in this case filed a defense of statute of limitations. And in our complaint we originally alleged a fraudulent concealment, which would have tolled the statute of limitations. We put in damage evidence for the period 1970 through '75, and we have introduced evidence throughout the course of the trial bearing on the issue of fraudulent concealment, and that evidence and the state of the record now is such that I think is uncontroverted that the fraudulent concealment has been established in this case. Champlin hasn't put on any evidence at all as to their statute of limitations defense. And I think while the Court has previously indicated in chambers and otherwise that it really wasn't an issue, in the instructions—

THE COURT: That what wasn't an issue?

MR. BENDINGER: It was no longer an issue.

THE COURT: You said that a ruling was no longer an issue.

[Tr. 3401] MR. BENDINGER: No. That the fraudulent concealment wasn't really an issue any more and the jury instructions that the Court is going to read to the jury today, as I understand it, have the damage period 1970 through '75, which I think—

THE COURT: That they do.

MR. BENDINGER: Which I think implicitly goes to the fraudulent concealment issue, but there has been no formal ruling on the record, and I think for purposes of this case that we ought to—we ask the Court to for-

mally rule now and that we have satisfied our burden. They haven't produced any evidence whatsoever to controvert the evidence in the record of the concealment of the distribution of records, so we would ask for the Court's ruling.

[Tr. 3402] THE COURT: Mr. Munn.

MR. MUNN: I think it would be error to so rule.

THE COURT: Why?

MR. MUNN: You would in effect be taking fact questions away from the Jury. You would be overruling Judge Morris' published opinion in this case as to what does and does not constitute fraudulent concealmeant, and that's our position.

THE COURT: And that was as to Third and Fourth Party—

MR. MUNN: The law is the same regardless of what party the rule is applied for or against. Yes.

MR. BENDINGER: Well, I don't think Judge Morris' opinion, Your Honor, addressed the issue in the context it's now being put before the Court. In that case, it was just merely a matter of whether we are—our complaint—the Amended Complaint related back to the original filing date and whether or not Mason and Bowles should be allowed to be brought into this case; and the issue there was we—the Judge said, in fact, when we took Entriken's statement we were at least on notice then and we could have brought Bowles and Mason in; it wasn't merely a mistake on our part, but we made a tactical decision not to name them when we filed the lawsuit against Champlin. That was the basis for the Court's ruling in that case. It had nothing [Tr. 3403] to do with whether or not the evidence that's come in in this case is sufficient to establish fraudulent concealment. It's in an entirely different context.

THE COURT: What ruling is it you want of the Court? That what?

MR. BENDINGER: That we have sustained our burden of showing fraudulent concealment or, in addition,

that they have waived their statute of limitation defense.

I neglected to mention that earlier, but I do think that they have waived it because when the Caldwell damage exhibits were introduced, offered to the Court as Evidence, Mr. Munn made a long argument against their introduction and went through some six or eight or nine objections to those exhibits; and that one of the objections was based on statute of limitation ground, and it seems to me in the normal course, if Champlin objected to the damage period or the damage evidence, then they would have filed a motion to strike portions of the damage—damage exhibits as being outside the statute of limitation; or they at least would have noted for the record that there was a statute of limitations problem. They didn't. I don't think they have reserved at this point any limitations defense.

The context it comes up in, Your Honor, I think, is under the Instructions and under the records that currently exist. It's proper for the Jury, I think, to consider our [Tr. 3404] damage evidence from January 1, 1970 through—

THE COURT: 1975.

MR. BENDINGER: —through 1975. And I understand what Mr. Munn's position is, and I wouldn't be surprised that if during argument he stands up and said they could only consider four years without a ruling from the Court.

THE COURT: It's not an issue in controversy, the Court shall rule that the Plaintiff has sustained its burden.

MR. MUNN: You are ruling that the statute of limitation is not an issue in controversy in the case.

THE COURT: That is right.

MR. MUNN: We except to the ruling.

THE COURT: Plaintiff has sustained their burden as to fraudulent concealment.

* * * *

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULY TERM—*August 3, 1981*

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

No. 80-1630

(D.C. No. 75-276-C)

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiff-Appellees,

VS.

CHAMPLIN PETROLEUM COMPANY,
Defendant-Appellant,

FREDA DEA ENTRIKEN,
Third Party Defendant-Appellee,

DEWEY MASON and MICKEY BOWLES,
Fourth Party Defendants.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part and reversed in part. The cause is remanded to the United States District Court for the Eastern District of Oklahoma with instructions to reduce the treble damages awarded to $1,360,770.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 75-276-C

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs,

—VS—

CHAMPLIN PETROLEUM COMPANY,
Defendant and Third Party Plaintiff,

—VS—

FRED DEA ENTRIKEN,
Third-Party Defendant and Fourth-Party Plaintiff,

—VS—

MICKEY BOWLES and DEWEY MASON,
Fourth-Party Defendants.

JUDGMENT ON ATTORNEYS' FEES AND COSTS

In accordance with this court's order of June 4, 1980, granting plaintiffs' attorneys' fees in the sum of $553,281.31, and this court's order of June 10, 1980, taxing plaintiffs' costs in the sum of $15,762.82, it is the order of this court that the plaintiffs, King & King Enterprises, d/b/a King Gas & Oil and Carl R. King, d/b/a King Gas & Oil, recover judgment against the defendant, Champlin Petroleum Company, in the sum of $569,044.13 for said attorneys' fees and costs.

It is ordered this 8th day of July, 1980.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 75-276-C

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs,

—VS—

CHAMPLIN PETROLEUM COMPANY,
Defendant and Third Party Plaintiff,

—VS—

FRED DEA ENTRIKEN,
Third-Party Defendant and Fourth-Party Plaintiff,

—VS—

MICKEY BOWLES and DEWEY MASON,
Fourth-Party Defendants.

AMENDED JUDGMENT ON JURY VERDICTS

In accordance with this court's order of June 3, 1980, remitting $450,000.00 of the amount of the jury's verdict herein, it is the order of this court that this court's Judgment on Jury Verdicts, filed herein on May 21, 1980, is amended to order that the plaintiffs, King & King Enterprises, d/b/a King Gas & Oil and Carl R. King, d/b/a King Gas & Oil, recover judgment from the defendant, Champlin Petroleum Company, in the sum of $2,267,826.00 plus twelve percent (12%) interest thereon from the date of the original judgment and attorneys' fees and costs as ordered by this court, the sum of

$2,267,826.00 representing the jury's verdict for plaintiffs, after remittitur by this court, in the sum of $755,942.00 trebled, all in accordance with 15 U.S.C. 15.

The court further orders that the remaining portions of this court's Judgment on Jury Verdicts filed May 21, 1980, shall stand as ordered.

It is so ordered this 4th day of June, 1980.

/s/ Frank H. Seay
FRANK H. SEAY
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 75-276-C

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs,

vs.

CHAMPLIN PETROLEUM COMPANY,
Defendant and Third Party Plaintiff,

FRED DEA ENTRIKEN,
Third Party Defendant and Fourth Party Plaintiff,

vs.

MICKEY BOWLES and DEWEY MASON,
Fourth Party Defendants.

TRANSCRIPT OF PROCEEDINGS

May 8, 1980

* * * *

[Tr. 2769] Now, the next one is, Mr. Jeff Smyth. Mr. Smyth is a Champlin employee. Contrary to Mr. Giauque's assumptions, he is not being asked to give opinions. He has simply made mechanical calculations, and I think at this point the best thing to do is to go to specifics. Mr. Smyth's first exhibit that he will refer to is Defend-

ant's Exhibit 19. All that this does is mechanically break out the amount of damages in the Caldwell study attributable to alleged sales below his desired level and the amount above, and the amount for the statute of limitations, period. And the amount after.

Mr. Caldwell said he didn't have that information when I questioned him about it, but he said anybody could compute it from the exhibit. It's strictly a mechanical [Tr. 2770] calculation that anyone with a knowledge of mathematics can do. Mr. Smyth utilized a computer to do it rather than doing it mechanically because it was faster and more expeditious. But the exhibit is not a critique of Mr. Caldwell's calculations. It's simply a segregation of them into two separate divisions. I think a Champlin employee is—ought to be permitted to do that. I think the Jury is entitled to know what is and is not barred by limitations. And I think they are entitled to know how much of these alleged damages result from sales below the optimum level selected by Mr. King, and how much above.

THE COURT: You want to get in the Statute of Limitations business again with him, is that right?

Mr. MUNN: Sir?

THE COURT: You want to get into the Statute of Limitations again?

MR. MUNN: That's the reason for one of the two subdivisions on Defendant's Exhibit 19, yes, is simply to say how much of those damages are attributable to the period prior to October 1, 1971.

THE COURT: That issue of Statute of Limitations, we have taken care of it, haven't we?

MR. MUNN: Have we? How?

THE COURT: Haven't we?

MR. MUNN: I don't know. Have we? How have [Tr. 2771] we taken care of it? I'm asking for information.

MR. GIAUQUE: I would ask, Your Honor—

MR. MUNN: Wait a minute. May I finish my argument to the Court and then you can go later.

I'm trying to find out what you're saying to me. I don't know what you're saying when you say—

THE COURT: Who's in charge here?

MR. MUNN: You are.

THE COURT: If you will let me say who talks rather than you say.

MR. MUNN: Excuse me. I should have. Yes.

THE COURT: Yes. Thank you.

Yes, sir.

MR. GIAUQUE: We would only note that when the Motion to Exclude the Caldwell Exhibit was made that the Statute of Limitations was not one of the grounds for excluding it. The damage study covers the period from January 1, of '70, because of the fraudulent concealment argument of the Plaintiffs, through the Fall of 1975, and that was simply not one of the grounds reserved on either the Motion to Exclude the Caldwell Exhibits nor the Motion for a Directed Verdict, and we deem the matter to have been waived at that point.

MR. MUNN: May I respond?

THE COURT: Yes.

[Tr. 2772] MR. MUNN: Well, the answer I'm not talking about excluding the Caldwell exhibit. I don't think the fact an exhibit is in Evidence means that the Statute of Limitations is written out of the case. And so, Defendant's Exhibit 19, as I was saying, simply shows the portion of the damages which are attributable to a period that we contend is barred by limitations.

* * * *

[Tr. 2830] THE COURT: Objection sustained as to 19 and 24.

MR. MUNN: All right, sir.

THE COURT: Into evidence, and any evidence with it.

MR. MUNN: I want to make my offer of proof.

THE COURT: All right, sir.

MR. MUNN: The defendant offers Defendant's Exhibit 19 and Defendant's Exhibit 24, which is the backup for it. And if we had been permitted to do so by the Court, would have had Mr. Jeff A. Smyth testify that Defendant's Exhibit Number 19 is a mathematical computation based upon Defendant's Exhibit 24, and that Defendant's Exhibit 19 shows two things.

THE COURT: I want to say this. At the top, before you say that, that it does say Caldwell Calculations.

MR. MUNN: I understand.

THE COURT: All right.

MR. MUNN: It says King Gas & Oil, too. But, that is for identification of who we are talking about.

I started to say if permitted Mr. Smyth would testify that Defendant's Exhibit 19 shows two things.

First it shows that of the $271,744 claim included in the Caldwell calculations under the heading Predatory and [Tr. 2831] Coercive Pricing Claims, some $166,231 was applicable to the period October 1, 1971, and following. And some $105,513 was applicable to the period prior to October 1, 1971. That being the approximate beginning of the limitations.

Second, he would testify that it shows as a mathematical calculation that of the $271,744 claim, 84 percent, or $228,954 is attributable to sales below the desired level established or testified to by Mr. King. Sixteen percent, or $42,790 is applicable to sales above the so-called desired level. That covers it.

THE COURT: All right, sir, thank you. Any record you want to make?

MR. GIAUQUE: I would only note for the record that the Caldwell damage exhibit covered a period of from January 1, 1970, through 1975. There was no objection made to the introduction and receipt of those exhibits on the grounds that they exceeded the statute of limitations.

* * * *

[DEFENDANT'S EXHIBIT 19—REFUSED]

KING GAS & OIL
CALDWELL CALCULATIONS
SUBDIVISION OF PREDATORY AND
COERCIVE PRICING CLAIMS

	Prior to 10-1-71	Subsequent to 10-1-71	Total Amount	Total Percent
Sales BELOW Desired Level	$ 85,353	$143,601	$228,954	84%
Sales ABOVE Desired Level	20,160	22,630	42,790	16
	$105,513	$166,231	$271,744	100%

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil No. 75-276-C

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,
Plaintiffs,

vs.

CHAMPLIN PETROLEUM COMPANY,
Defendant and Third Pary [sic] *Plaintiff,*

FRED DEA ENTRIKEN,
Third Pary [sic] *Defendant and Fourth Party Plaintiff,*

vs.

MICKEY BOWLES and DEWEY MASON,
Fourth Party Defendants.

EXCERPTS OF TRANSCRIPTS OF PROCEEDINGS

April 21, 1980—May 14, 1980

* * * *

[Tr. 17] [OPENING STATEMENT OF MR. GIAUQUE FOR KING]

* * * It will show from the time King came into this market until the time it was virtually destroyed in this market, everyone, everyone tried to get their prices up. You can't imagine, members of the Jury, how much attention this little King & King Company got in the circle of Champlin and the other companies. It was also

mentioned that there will be phone records offered in evidence here that will show everyone called them trying to get their prices up, trade associations which Champlin was a member, and other oil marketers called them constantly. They had calls from the big boys, they had calls from the big branded independents. The message you will hear is always the same. Why don't you get your prices up, let's have a healthy market. Then they would more often than not tell King the price on threats of the bigger companies driving the prices back down. Now the result of this kind of activity was that either the market was at an artificially high * * *

* * * *

[Tr. 21] willing to live with it, but they couldn't live with people constantly harranguing [sic] them about where they had to be and by a given time for they had calls from a Mr. Belanger, who at that time was with Triangle. You will hear him testify because he is now with King. Instructions he received from his superiors to go get King, to get his prices up or else. You will hear about calls to the Kings from a Bob Phillips. You will hear Entriken testify he fixed prices on more than two dozen occasions. He will expressly testify about Bob Phillips of the Vickers people, a Mr. Gerald Tush called King with respect to fixing prices in the Kansas City area. This was before they moved down here to Oklahoma. The company called Derby, that's a trade association called Sigma, which Champlin is a member. Conoco would call them all of the time. They would get calls from Matt Wright and Consumers in Tulsa, who was one of the biggest price fixers, and Bob Phillips. What kind of calls will the evidence show they received? You will hear testimony that Phillips said before they, Kings, planned to come into Oklahoma, "you can't come in to this market with self-service" or "you can't come into here with those kind of prices because we won't allow it". But they had calls from Matt Wright and Bob Phillips to the

effect "We are going, if you don't move up with your prices, we are going to bring this market to the bottom". Matt Wright, with Consumers, the testimony will show even called [Tr. 22] on occasions the Kings and said "If you don't get your prices up, we'll get in touch with your suppliers", which was Mr. Phillips of Bell, "and get your supply cut off". Well, an independent who is principally—when his two largest sources of gasoline supply is Bell, they are going to pay some attention when somebody threatens you like that, especially when that call is followed up immediately by calls from Mr. Phillips of Bell saying "That's right". "You may not have gasoline to sell". "You'd better get smart, get your prices up. We're not going to tolerate it. We are certainly not going to tolerate in our market in Oklahoma". [Tr. 23] Because this has been a well structured stable market about 1968. All right, when King entered the Oklahoma market in late '66 and in early '67, and this is a critical piece of evidence that You [sic] will hear, there had been in the Tulsa area a self-serve operation, and he advertised self-serve but he didn't price as a self-serve. He never tried to take a spot or a price advantage from any of the other sellers. So when King came in it intended to take that spot because it always had wherever it marketed as a self-serve. It always thought that the public deserved a two cent spot or three cent spot because they weren't getting any service. And that cost saving will be passed on to the gasoline buyer. So when they came in here they were the first self-serve operation in this area. And that is important because it was that aspect of their operation that got the attention of Champlin and the other companies immediately.

There was conspiratorial activity to rig the prices when they were in Kansas City. That same conspiracy continued, and in effect it shifted, it geographically shifted to the Oklahoma and Texas area after they moved down here because now they were in a different territory and they were hearing from different people. Some-

times they would hear from the same people. For instance, the evidence will show Bob Phillips was calling them about [Tr. 24] Kansas, Arkansas, Oklahoma, he wanted their prices up everywhere, and he was rather coarse about the way he put it to them.

Dea Entriken at this point in time had been employed by Champlin as a price coordinator. His job, the evidence will show, was to restore depressed markets. And as I have indicated, he would make numerous calls to competitors and discuss existing prices and future prices, mostly future prices.

Mack Wright, once they moved into Oklahoma, once King moved into here, Mack Wright continued with his threats. He would call and he would tell the Kings that nobody would supply them down here. Phillips said he warned Carl King that if he didn't raise his price he would find himself without supply. Well, that's the same broken record he gave him up in Kansas. But they told him expressly when they came into Oklahoma, told him something a little different. They told him they weren't going to allow self-serve to have a differential at all. They said, we're not going to let you have that differential in this market.

A Mr. Barbary of Consumers and a Mr. Mack Wright of Consumers arranged a lunch. Actually, the first part of this little conspiracy story on this lunch began back in Chicago at a meeting that the Kings, of course, weren't [Tr. 25] in attendance at. But the evidence will show that some of the larger companies set up a meeting in Tulsa because they wanted King to come, they wanted to talk to him about getting his prices up. So they set up a luncheon and after the luncheon, the evidence will show that Mr. Barbary and Mack Wright of Consumers took Carl King, they drove him around Tulsa and they looked at his price signs, and they told him that he better get his prices up with no self-service spot or they had no other choice other than to retaliate, and they reminded him they had a lot more money to retaliate than he had.

And right after the luncheon King gets back to his office in Kansas City, Mr. Bob Phillips, the supplier from Bells calls and he rides him again about getting his prices up.

Now, the evidence is going to be very clear, it's going to be repetitive on those kinds of calls that King was getting. We're going to have evidence in this case that when the price moves, when the price restorations that Mr. Entriken and others were involved in were supposed to take place, they in fact did take place, that this wasn't just something fanciful that people dreamed up. They didn't spend all that time and money on the phone for nothing. * * *

* * * *

[Tr. 33] * * * You'll hear testimony from a [sic] X manager of King that Champlin threatened him if King didn't raise his prices at a particular station in Tulsa. That Ride, Ride the Shell fighting brand would be used or Harbor would be used in the area to lower his price to either match King's price or undersell him until King raised his price or went out of business. But those kind of direct threats were made.

[Tr. 34] That is the kind of evidence you will hear in this case and I would hope that when you have heard that evidence and when you have heard whatever explanation there is for that kind of conduct that you will agree with us that this kind of conduct has to be stopped. Now, we're living in a different age and a different market these days, but there are always going to be independents out there trying to do business on their own, and there are always going to be bigger companies trying to dictate to them. And in this case it was both dictating up and dictating down. The companies would tell King, "You either agree to go up or we will force it down." They never let them price at a level where they could get decent volume and a decent profit. It was either rig the price up to normal markets and either deny them the spot, or get them up to the point where

consumers wou'dn't go there anyway, they would just as soon go to Phillips, or drive it down to the point where nobody could make any money. But it was a pattern of years and years of interference in an independent businessman's decision as to where he wanted to sell his own product.

Now, you will hear testimony about Entriken's authority to fix prices. There will be evidence offered to show that he was not an impersonal fellow. Mr. Entriken didn't just walk into this job and start fixing prices [Tr. 35] without somebody telling him what to do. There will be evidence that Mr. Mason, who was his boss, gave him a telephone directory, told him some markets were down and wanted to know if he was effective in getting them up. He told him who to call, he told him to call Mack Wright and Phillips and a few of these guys and get things moving. That was his job. A little later on he sat down with Mr. Mason, Mr. Entriken and Mr. Mason sat down and drafted a list of who he could talk with and who he couldn't talk with. The people on the right side, they put there could be no talk because they couldn't be trusted. One of them even had filed a lawsuit involving pricing activities. Well, he certainly couldn't be trusted. But the people that could be trusted were all shown on the left-hand side and it's all the people that rigged these markets and the people that Entriken's diaries will show he called constantly. And he would get them to commit and he would commit for Champlin and then he would get others to commit based on that commitment. And a series of cross assurances and commitments had the effect of rigging the market.

• • • •

[Tr. 86] [TESTIMONY OF FRED KING]

Q. [By Mr. Giauque, for King] All right. Now could you tell us a little about King & King, the family corporation? Who are the shareholders?

A. My brother is the only shareholder.

Q. All right, and who are the other officers of the corporation?

A. I'm the Vice President. Ed McGuire is the Secretary. Mr. Belanger is the Vice President and Carl is the Treasurer.

Q. Mr. Belanger joined the company when?

A. I believe in 1971.

Q. He had previously been with Triangle?

A. That's correct.

Q. Can you tell us, Mr. King, maybe you already have, when was this business started, the business now known as King & King?

A. The corporation was incorporated in 1959. My brother actually started the company in 1954.

Q. And the King Gas & Oil Company is owned by whom?

A. Carl King.

Q. Is that a business name only for Mr. King, your brother?

A. That's his individual business name that he operates under, yes.

• • • •

[Tr. 102] Q. Did you try to set your prices independently?

A. Beg your pardon?

Q. That is, did you as King try to set them independently, make your own decisions on price?

A. Yes, we did.

Q. Now were there times when persons outside of the King organization tried to tell you what prices you should sell?

A. Many times.

Q. Did you have phone calls from competitors?

A. Yes.

• • • •

[Tr. 105] Q. All right, during the period of time, let's say, when did you first receive such phone calls?

A. In '66, '67.

Q. How long did such phone calls continue?

A. Oh, clear up until the supposedly gas crisis they had in '73.

Q. Can you tell us, Mr. King, from whom in that early period of time, that is '67 through 1969, you had phone calls from with respect to future prices?

A. It would be Skinner with APCO in '68. Gerald Tush with Champlin. Eddie Warren with Vickers. A man by the name of Enloe with APCO, but I think there was a man by the name of Mooney with Kerr-McGee. We had some calls from Belanger when he was with Triangle.

Q. This is Mr. Belanger who is now an officer of King?

A. Yes.

Q. What was his position at Triangle before he joined King?

A. I don't know just what his title was, but I think he [Tr. 106] was territory manager.

Q. When he was with Triangle did he call the King organization with respect to future prices?

A. He called to ask us to raise our prices.

MR. HILL: I object and ask that that be stricken. That's the rankest form of hearsay.

MR. GIAUQUE: May we approach the Bench?

THE COURT: I know what you're driving at but the objection will be overruled.

Q. Did you receive calls from Mr. Frank Sylvester?

A. In, I think, '69 and '70 Frank started calling me.

Q. All right. If we go to that, if we go to that period of time ,'69 and '70, who was Mr. Sylvester with?

A. APCO.

Q. Did you receive calls from Mr. Harry Griggs from APCO?

A. Yes.

Q. Did you receive calls from one Glen Stringer from APCO?

A. Yes.

Q. Were all of the calls to the same effect?
A. Yes.
Q. What was that effect?
A. Move your prices up.

* * * *

[Tr. 115] MR. GIAUQUE: Your honor, I want to make one thing clear. The conversation with Mr. Tush from Champlin where he called and told them to get their prices up was in the area before they moved into Oklahoma and then after they moved into Oklahoma they received the same calls from different Champlin employees, price coordinators, the coordinators from Kansas City, the same in Tulsa where they moved to show the on-going conspiracy where these people would call. "We have talked to others. You can get your price up or else." The same kind of threats in both areas. That as they moved into Oklahoma new people took over the same kind of conversations.

* * * *

[Tr. 118] Q. Mr. King, did you receive telephone calls from competitors before you moved into Oklahoma, the substance of which was also the subject of calls after you moved into Oklahoma?

Did I confuse you?

A. A little bit.

Q. Did you receive the same kind of calls after you went into Oklahoma from competitors about your prices that you received before you came down here?

A. Yes.

Q. Did you receive calls from the same companies after you came down here that you had been receiving before?

A. Oh, we had some different callers then, such as [Tr. 119] Mack Wright with Consumer Oil, Bob Phillips with Bell Oil and Gas started calling, we had a service station operator, Reed or Reeda, who called me once or twice.

Q. Let me ask you this, did you receive calls, let's say, after you came into Oklahoma? Did you receive calls from competitors up in Kansas City at the same time you were receiving calls relating to your Oklahoma operations?

A. Well, I received calls about Kansas City and Kansas market areas, the same people would not be talking to me about Oklahoma market areas.

Q. Were the same companies talking to you?

A. The same companies.

Q. Was the subject matter the same in both cases?

A. Yes, "raise your price."

Q. Let's take the earlier of those conversations you mentioned that you had received calls from Frank Sylvester, I believe you said, at APCO.

A. Yes.

Q. About what period of time?

A. Frank didn't come into the picture until late '69 or '70 when he took over the price desk at APCO. Previous to that I had had calls from a Glen Stringer and a Harry Griggs from APCO.

Q. Which of those three called you at the earliest point in time?

[Tr. 120] A. Glen Stringer.

Q. And did Glen Stringer at APCO also call you on this subject of pricing after you went into Oklahoma?

A. Yes. Glen was transferred, I think, to Oklahoma City and he made calls from Oklahoma City concerning the prices in Oklahoma.

Q. And at that point after he moved to Oklahoma City did he have some pricing responsibility for the Oklahoma area for APCO?

A. I don't know what Glen's title was or what is [sic] responsibility was, he could call me about the Oklahoma market, he would call me about the Wichita Kansas market area.

Q. Did he call you before he left Kansas City for Oklahoma, and after he left Kansas City?

A. I don't think he called me about Oklahoma until after he left Kansas City.

Q. Okay. Now, when he called you before he left for Kansas City on how many occasions would you say Mr. Stringer of APCO called you?

A. I couldn't count the number.

Q. A number of times?

A. Yes. A goodly number of them, I couldn't recall the number.

Q. And in these conversations did he talk directly with you?

[Tr. 121] A. Yes.

Q. Did he sometimes talk with your brother?

A. Not that I know of.

Q. At the times Mr. Stringer would call you would you note the call in some record?

A. Only if he called and I would be out he would leave a message.

Q. So, you do have telephone records showing where somebody, a competitor, called where you weren't in?

A. Yes.

Q. And you were to call back?

A. Yes.

Q. And did you do that on occasions?

A. Sometimes.

Q. And Mr. Stringer left some messages that he would call?

A. Yes.

Q. In addition to those ones that you logged, he also called sometimes when you were there so you talked with him?

A. Yes.

Q. Lets' take up the conversations that you had with Mr. Stringer after he left Kansas City. What areas was he talking about, I believe you said Oklahoma and Wichita?

A. Yes.

Q. And would there be any other person that was party to those conversations other than yourself and Mr. Stringer?

[Tr. 122] A. Not on my end.

Q. And did you on those occasions after he left Kansas City and was in Oklahoma and called and you weren't in, did you note those in your logs, too?

A. Only if I was out.

Q. All right, if you were out? Now, on those occasions was—well, how many times would you say Glen Stringer of APCO called you after he left Kansas City?

A. Twenty, 25.

Q. And was the conversation to the same general effect?

A. Prices, "raise your price".

Q. And what, as you can best recall, would he say?

A. "What's the matter, don't you want to make any money?" Your price should be such and such in Tulsa, or it should be a certain price on north [sic] May, and you should be selling at a certain price over in Bethany.

Q. And what did you respond to those inquiries?

A. I would usually tell Glen I thought we had a pretty good price that we set there and I thought we could handle it.

Q. Did he ever tell you about some future price move that was set in either Oklahoma or Wichita?

A. He called me in Oklahoma City to tell me if—I can't remember the figure, he quoted the figure, if I would go to that price he could get the price up and everybody else would go along with it.

[Tr. 123] Q. And did you ever go along with his suggestion?

A. No.

Q. Was there any conversation with Mr. Stringer that was to any other effect other than what you have described?

A. Oh, he sometimes got a little profane and threatening about what our spot would be, and that they

wouldn't allow me to have that spot down here, and sometimes questioned my intelligence.

Q. Did he ever indicate that they needed King to go along on a move?

A. Yes.

Q. How many times?

A. Three that I know of.

Q. And What [sic] areas were affected?

A. One was Wichita, and two was Oklahoma City.

Q. Now, you say after Stringer—Stringer was also calling you when he was up in Kansas City, did he make calls to the same effect then?

A. Yes.

Q. Was he threatening at that time?

MR. HILL: Your Honor, I object.

MR. GIAUQUE: I withdraw that.

THE COURT: Very well, sustained.

Q. When you say that he questioned your intelligence, or whatever, was the nature of his calls after he left [Tr. 124] Kansas City any different than it was prior to that?

A. Not much, no.

Q. Did he ever call you on the question of, or on any subject other than getting the prices up?

A. I know he never called me about lowering them. So, I would say the only calls he made was trying to get us to raise prices.

Q. What did you understand his position to be with APCO?

A. At the time in Kansas City I understood he was the price man.

Q. And when he left Kansas City who replaced him?

A. Harry Riggs was there for a short time, and then Frank Sylvester.

Q. Did Harry Riggs at APCO makes [sic] calls to you with respect to your pricing?

A. Yes.

MR. HILL: I object, Your Honor, that deals with an area outside this lawsuit and it is irrelevant.

THE COURT: Ask the question again.

Now don't answer.

Q. Did Harry Riggs of APCO who replaced Mr. Stringer call you also with respect to your pricing?

THE COURT: Does that have to do with the same objection you made at the bench just now, same reason?

MR. HILL: Yes, Your Honor.

[Tr. 125] THE COURT: Objection will be overruled, you may answer.

A. Yes. Harry Riggs called me about pricing and tried to get us to raise our prices.

Q. What specifically did Harry Riggs of APCO tell you about your pricing?

A. They were too low, we couldn't take that much spot, wouldn't allow it.

Q. Did he call at any time to report that other competitors, that he had talked with other competitors and they were upset about your pricing?

A. Yes. He had called to tell me that he had talked with Vickers, talked to Kerr McGee, talked to Conoco.

Q. And did you log some of those telephone calls in your records?

A. Only if I wasn't there to receive them.

Q. Did he leave any messages to the effect that other competitors had been objecting to your pricing?

A. I don't recall whether Harry did or not.

Q. All right. Now, he was—did he ever tell you about a future price move?

A. Yes.

Q. On how many occasions?

A. I couldn't recall how many, on several occasions. [Tr. 126] occasions [sic] Q. And this was in a phone conversation directly with you?

A. Right.

Q. Was he talking about future prices?

A. Yes. He would talk about who was going to pull price support and what time, what price they was [sic] going to go to, what price they thought I should price at.

Q. What was your response?

A. They would even give us the time of day they were going to do it.

Q. Did you understand he was talking about a number of companies moving simultaneously?

A. Not simultaneously, they would do it in an 18-hour period. One would pull support at the opening of business, one would pull support at ten o'clock, one at twelve, one at three, one at eight the next morning, in a matter of 18 hours they would all pull their support and—

Q. Did he tell you how he knew these other companies were going to take that action?

MR. HILL: Your Honor, that is calling for double hearsay.

MR. GIAUQUE: That can be answered yes or no, I believe.

THE COURT: Overruled. He can answer.

A. Yes.

[Tr. 127] Q. Was there any indication of these conversations that he had communicated with other competitors?

A. Yes.

Q. Now, he was replaced by Mr. Frank Sylvester of APCO, was he?

A. Yes.

Q. Did Mr. Sylvester call you on this subject of your prices?

A. Yes.

Q. And what period of time are we talking about now?

A. Frank has called me up through '73, he has called me about other things besides prices since then.

Q. Within the period, say, '70 to '73, how many times did Frank Sylvester call you about your prices?

A. Probably at least once a week.

Q. And these again were conversations between the two of you directly?

A. Yes.

Q. And can you distinguish one of those conversations from the other or was there the same general subject matter?

A. Same general subject.

Q. What was that?

A. Well, he would, on occasions, tell me, "You are priced too low and you are going to have to bring your [Tr. 128] price up. We are not going to give you that kind of spot." Where, if the market was depressed, he would call and say, "Well, the market is going to go up in Springfield, Missouri." He would say, "Sinclair is going to such and such price at such and such a time, Phillips will go at such and such a time, Hudson is going to move," give me a time table, "We need you to come in at such and such a price."

Q. And what would you say to him?

A. I would say, "Frank, we'll take a look at it."

Q. Did you ever make a commitment to him?

A. On the price move?

Q. Yes, the price commitment to move at a given time?

A. No.

Q. Did you ever make such a commitment to move at a future time with certain prices with any one of the competitors?

A. No.

Q. Did Mr. Sylvester ever report to you information that indicated he had been in communication with some other competitor?

A. Yes.

Q. What did he say?

A. Oh, he would tell me he talked to Virgil Donahue, he talked to Gerald Tush, he talked to Art Nace, he

talked to Eddie Warren, I think he even said one time he had a [Tr. 129] back door connection with "Big Red".

Q. Who is "Big Red"?

A. American Oil.

Q. Is that Standard of Indiana?

A. Yes.

Q. Mr. Tush is with Champlin?

A. Yes.

Q. Who is Mr. Nace with?

A. Conoco, or was with Conoco, he is retired now.

Q. What was Mr. Nace's position with Conoco?

A. Well, he was in charge of price, issuing price support.

Q. Did you have any conversations with Mr. Nace from Conoco about your prices?

A. Yes. When we were a Conoco jobber I talked to him frequently.

Q. And what was Mr. Nace asking you about your prices?

A. He thought I was pricing Conotane too low.

Q. He thought you were pricing what?

A. Conotane.

Q. Were you selling Conotane?

A. Yes.

Q. Did he try to get the prices up?

A. Yes.

Q. Did Mr. Nace ever tell you about future moves? [Tr. 130] A. Well, yes. They would call and tell me when the price support was to be pulled and who was going to go up, and at that time we received some price support from Conoco.

Q. Did you ask for it?

A. On occasion.

[Tr. 131] Q. Now, you mentioned Mr. Warren, who is Mr. Warren?

A. He is with Vickers.

Q. Did you also receive calls from other Vickers Employees [sic] with respect to your pricing?

A. I received calls from Earl Zook.

Q. How about Bob Phillips?

A. When Bob Phillips was with Bell Oil Company.

Q. What period of time was he with Bell?

A. Well, I don't remember just the date that [sic] Vickers bought Bell. I think around '69.

Q. How many calls did you have from Gerald Tush and Champlin during the period '72-'73?

MR. HILL: I object it is irrelevant.

THE COURT: Overruled. You may answer.

A. Oh, Gerald called two or three times a month as a general rule.

Q. Did you also log in your logs calls from Mr. Tush that came in when you weren't in?

A. Whenever I wasn't in, yes.

Q. You did have person to person conversation with him?

A. Yes, numerous occasions.

Q. Concerning your prices?

A. Concerning our prices and concerning restorations that was going to take place mainly in the State of Kansas.

Q. What did Mr. Tush tell you?

[Tr. 132] A. Well, he would give me a time table agsin [sic] if we were going to pull price support he was going to go up or call and say "Well, they are not going to allow you to have two cents in Wichita. You have to have the market with the mini-majors [sic] or one time I think he said "Well, if you will agree to one penny we will give you a penny".

Q. Did he ever say what would happen if you didn't get the price up?

MR. HILL: Your Honor, may we approach the bench?

THE COURT: Yes.

MR. HILL: I just want to make it clear that my objection is continuing so I don't have to—

THE COURT: Wait until he gets up here.

(AT THE BENCH)

MR. HILL: I just want to make it clear our objection to these conversations with Mr. Tush with counsel so I don't have to keep getting up looking silly. Is that okay?

THE COURT: That's fine.

MR. HILL: Is that okay with you? Could I have a continuing objection to all conversations dealing with the states of—any states other than—

THE COURT: I am sorry I can't hear you now.

MR. HILL: I'm sorry [sic]. Is it agreeable with Mr. [Tr. 133] Giauque and the court that I have a continuing objection to the admissibility to conversations relating to any other states other than Arkansas, Texas and Oklahoma?

MR. GIAUQUE: Yes. Your objection is on relevancy?

MR. HILL: On relevancy of the conversation.

MR. GIAUQUE: I have no objections.

MR. HILL: The court already ruled on the other objection and it has been noted.

MR. GIAUQUE: I would merely add that with regard to Mr. Tush we would base the questions not only on the co-conspirator but on admissions of a party.

THE COURT: You do have a continuing objection.

MR. WALKER: I thought perhaps you were not aware of the time, but I see you have your watch in front of you.

THE COURT: I am going to quit before 5:30, but I am very near stopping. Is there a stopping place?

MR. GIAUQUE: I will come to one right away.

MR. WALKER: Do you want, if it goes past the time indicated you are going to stop, would you want a lawyer to call your attention to it?

THE COURT: I don't mind at all.

MR. WALKER: I didn't know.

THE COURT: I sure don't mind. No, I was just on the verge of stopping. I thought I would find a place [Tr. 134] to stop.

(OPEN COURT)

DIRECT EXAMINATION (Continued)

BY MR. GIAUQUE:

Q. The question, Mr. King, is did Gerald Tush or Champlin in any of these phone calls described tell you what would or might happen if you didn't get your prices up?

A. Yes. If the price was on the bottom he would say unless you are willing to go to a certain price the market won't move. If the market was up he would say if you won't take less of a spot the market is going to go down.

Q. You indicated that he said you can't have that margin. They won't allow it. Did he identify who the "they" was?

A. Not specifically, no.

Q. Did Mr. Tush in his conversations identify the particular companies moving to a given price at a given time?

A. Yes.

Q. He had conversations with you on numerous times about future price moves?

A. Yes.

Q. Do you recall any conversations with Mr. Tush about [Tr. 135] an incident or a move in Salina, Kansas?

A. Yes.

Q. What did he say?

A. They wanted me to set my price with Hudson of Deleware [sic] and I think one other, and they had set up the price structure of how the price was going to go up and what the spot would be between each company, and if I wouldn't go along with that, well the market would come down and stay down.

Q. What did you respond?

A. Do your best.

Q. What happened to the market?

A. Well, it tried to go up and I didn't match the Hudson of Deleware [sic] price, and it did exactly what he said, but it went down and stayed down sometime in Salina.

Q. In your experience when people told you something would happen, that a price move would take place did you observe whether it did or not?

A. Yes.

Q. What was your experience?

A. I would say the move took place ninety percent of the time.

Q. In those instances where they said if you don't go up the market will stay at the bottom, did they stay down?

[Tr. 136] A. Yes.

Q. In other words, the information they were reporting to you was accurate?

A. Yes.

* * * *

[Tr. 155] Q. Mr. King, last evening we were discussing various telephone calls you received from competitors with respect to pricing. We had discussed a Gerald Tush. I forgot to ask did he identify himself as being an employee of Champlin when he called?

A. Yes.

Q. What was your understanding of his position with Champlin [sic].

A. Gerald worked a price list in Kansas City.

Q. Can you estimate how many times you received calls from Mr. Gerald Tush of Champlin with respect to the subject of prices?

A. No, I couldn't estimate the number of times over a three or four year period. He has called me probably on the avearge of three or four times a month.

Q. And at any time when Mr. Tush called you was he talking about getting any prices down?

A. No.

Q. At any time was he talking about present price situations rather than future price moves?

[Tr. 156] A. He talked about the present price situations, yes.

Q. How frequently would he, in these discussions, bring up the potential of future price moves of which he purported to have knowledge?

A. I don't really know how often. It was according to if the market was depressed and if there was restoration underway. He would call to say, "Well, that Hutchinson, Kansas, the pricing will go up this afternoon". "Vickers will do this". And name off the companies who were going to raise and what time they would raise.

Q. Did you at any time agree with Mr. Gerald Tush of Champlin to go along with the price move that he announced to you in advance?

A. No. My standard answer to all of the people, "We'll take a look at it".

Q. Yesterday you told us about a certain APCO personnel who called you about pricing and I believe you said that Frank Sylvester was, in point of time, the last of those three that called you. Is that correct?

A. Yes.

Q. Maybe I'm confused. Gerald Stringer was the earliest of the APCO people who called?

A. Yes, sir.

MR. HILL: Objection, as leading the witness.

THE COURT: You are leading.

[Tr. 157] MR. GIAUQUE: That is leading.

Q. Who was the first of the APCO personnel that called?

A. Glen Stringer.

Q. And who are the other people from APCO that called you on the subject of price?

A. Griggs, Frank Sylvester. I have had a call or two from Lyndell Pearson.

Q. When Mr. Frank Sylvester called you, what did you understand his position with APCO to be?

A. He held the same position with APCO that Gerald Tush, or I understood Gerald Tush held with Champlin. He worked the price list and was responsible for pricing in a given area.

Q. And how many times did Frank Sylvester, during this period say '67 to 1973, call you about pricing?

A. I really can't give the number of times. I'd say it was at least once a week or oftener.

Q. And did he ever talk to you about getting your prices down?

A. No.

Q. Did he talk to you about present market situations as well as future prices?

A. Yes, he did.

Q. Did he at any time relate to you information which some company other than APCO was going to take?

[Tr. 158] A. Yes.

Q. Can you distinguish any one of these conversations from any other?

A. I can remember one in 1971.

[Tr. 159] Q. Was this a telephone call directly between yourself and Mr. Sylvester?

A. Yes, it was.

Q. And what did he say on that occasion?

A. He told me at that—on that occasion that he had talked with the majors and the other branded independents and he called them and they had decided that we could have a one cent spot below the branded independents. If we persisted in taking any more than that, that Skelly had said they would drive the price to the bottom and they would sit on our price at the bottom.

Q. And what was your response to Mr. Sylvester's statement?

A. Usually when they told me something like that with a threat I would say, "Do your best."

Q. What happened as a result of that conversation?

A. The price for the next six or seven months would be on the bottom, Skelly, Conoco, Fina, Champlin, Vickers, at times were selling two cents a gallon cheaper than our cost. Skelly used their Skeltane, Conoco using their Conotane, was sitting on our price or below it. And the other majors, including the Standard, Sinclair, Texaco, would take turns with their price sitting on ours.

* * * *

[Tr. 162] Q. The question was what was the conversation with the representative from Derby?

A. A man had called me and was objecting to the price that we were posted at our service station. They had a station approximately a half a mile away and he told me that he had talked to a Mr. Tolson, who was a Skelly distributor, and they would give me a certain spot, but if I insisted on taking more than that they were going to put the price on the bottom and leave it there.

Q. And what was your response to that?

A. The same, "Do your best."

Q. And what happened?

A. The price went to the bottom for, oh, a period of [Tr. 163] about ten days.

Q. And then what happened?

A. The man called me back and apologized, said he had made a mistake and they raised their price back up to normal.

Q. Now, when you made the decision to go into Oklahoma in the late sixties, did you participate in that decision?

A. Yes.

Q. And did you receive calls from competitors about your prices at or about the time you made the decision to go into Oklahoma?

A. The pricing was a continuous thing. They had people calling us continually trying to control where we set our prices, trying to get us to give them a commitment to set it at a certain level in the market, I don't recall that any of it stopped.

Q. When you went South, so to speak, that is going into Oklahoma, Texas, Arkansas area, did you begin to receive calls from competitor representatives that were different than those who had previously been calling you?

A. Yes.

Q. Who were those individuals who made calls to you?

A. Mack Wright with Consumers. I started getting calls from Bob Phillips with Bell Oil and Gas who was supplying our competitors as well as our supplier.

Q. Did you continue to receive calls from Mr. Gerald [Tr. 164] Tush of Champlin?

A. Yes.

[Tr. 165] Q. Did you have any calls from Mr. Stringer of APCO?

A. I have received calls from Glen when he moved to Oklahoma City.

Q. Did you have calls on the subject of your prices from any representatives of oil company trade associations?

A. Oh, we had SIGMA which was a trade association. I believe Howard Teague was the head of it. Dick Reynolds, Bob Cave and Walt Wiggins who was affiliated with trade associations.

Q. Did those persons call you from time to time about your pricing?

A. Yes. They called to try to get us to price at a certain level, raise the price here to be not so competitive.

Q. Did they purport to have information about future price moves in the market?

A. Yes. Howard Teague especially would call and he knew when almost all of the majors and the minimajors were going to move, when they were going to poll support. He had a regular time table for it.

Q. Now at the time Mr. Phillips, Bob Phillips, was calling you, what was his position with Bell?

A. I believe he was Vice President.

Q. When Mr. Mack Wright called you from Consumers, what was his position with that competitor?

A. I never really knew what Mack's title was at Consumers.

[Tr. 166] Q. When Mr. Stringer from APCO called you concerning—that is, at or about the time you were in Oklahoma, what was his position with APCO?

A. He was the pricing man. I don't know exactly what his title was.

Q. All right, now, how frequently would Mr. Bob Phillips of Bell call you with respect to your prices?

A. Oh, it would vary. I have had as many as three calls from Bob in one day. It might be thirty days before the next one. He might make ten calls in a month but it would vary. At times he—a man by the name of Claren Rhymer, who was stationed in Lincoln, Nebraska, would call me saying that he had instructions from Bob Phillips to call me.

Q. When you first came in the area, or shortly after you were in the Oklahoma area, did Mr. Phillips call you?

A. Approximately two months after we came into Oklahoma, yes.

And was that a person-to-person call conversation you had with him on the telephone?

A. Yes.

Q. Could you give us the substance of that conversation?

A. Bob would call. He called for my brother who was out and I took the call. He was rather irate because he

couldn't seem to get Carl to talk to him and informed me that we could not come into his territory and price like we were. He was [Tr. 167] not going to allow it. Bob is rather exciteable [sic]—

MR. HILL: I object to that comment.

THE COURT: Objection sustained.

Q. Just give us the conversation.

A. He was using profanity and informed me at that time that if we continued our marketing practices, that there was a possibility that our supply could be cut off in Oklahoma.

Q. At that point in time how significant a source of supply was Mr. Phillips' company to you?

A. Very important.

Q. Did he converse with you on that subject? That is, threaten to cut off supply on more than one occasion?

A. On several occasions he has threatened to cut off supply.

Q. In these conversations with Mr. Phillips of Bell did he advise you, Mr. King, what it was about your pricing that was upsetting him?

A. He wanted our self-service price to match the service price in Tulsa.

Q. Again, not to take a spot?

A. Not to take a spot.

Q. And did he identify who he included when he said you can't come into our market?

A. He never identified other companies as such to me, no.

[Tr. 168] Q. How long did these calls from Mr. Phillips of Bell on this subject continue?

A. For a period of probably two and a half to three years.

Q. All for the same effect?

A. The biggest part of them were—some was also our supplier and it would be about supply, the price of gasoline which we would pay, and from Bell.

Q. In your conversations with Mack Wright of Consumers, how long was it after you came into Oklahoma that you first had calls from Mr. Wright?

A. Probably five or six months.

Q. And did Mr. Wright call you, call you with respect to pricing matters on more than one occasion?

A. Yes.

Q. How frequently would you say Mr. Wright called?

A. It would vary from three or four times a week to once a month.

Q. Again, as I asked you yesterday, Mr. King, when these persons such as Phillips of Bell, Stringer of APCO, or Mack Wright of Consumers called you and you weren't in but you were to return the call, did you log that in your telephone log?

A. Yes. They are logged.

Q. Now when Mr. Wright first called you on the subject of your pricing, can you tell us what the conversation was, [Tr. 169] please?

A. Mack was upset with the spot. He said we couldn't take it in the Tulsa market, that we would have to price with Consumers; that they would not allow me to come into Tulsa and tear up their market.

Q. Did he indicate what would happen, if anything, if you continued to so price?

A. He threatened to call our suppliers to get us cut off from the supply.

Q. Did either Mr. Phillips or Mr. Wright at any time threaten to drive you our [sic] of the area?

A. Yes. They—I think Mack's terminology was "we'll [sic] drive you out of Oklahoma if you try to tear up our markets".

Q. Did Mr. Wright in any of these conversations discuss a future price move?

A. He has on occasions.

Q. And what would be the general subject of that conversation?

A. He would tell me when the price was going to move and say you are to come in at a certain price and

give me the price we were supposed to move the market to.

Q. Now let me see if I have the facts straight. Now, at this point in time, Consumers is not a supplier to you, they are a competitor?

A. They are a competitor.

[Tr. 170] Q. And at this point in time when Mr. Phillips is calling you his company, Bell, is both a competitor and a supplier. Is that correct?

MR. HILL: I object. That's leading the witness.

THE COURT: That is absolutely right. You are leading the witness.

MR. GIAUQUE: Yes, let me withdraw, Your Honor.

Q. What function did Bell perform in the market at the time you were receiving these calls from Mr. Phillips?

A. Bell was our supplier and they supplied our competitors.

Q. Did Mr. Wright ever tell you that he had contacted any of your suppliers?

A. Mack would, at the end of our conversation, when I wouldn't agree, he would say "We'll call your suppliers. We'll get your supply cut off". Within thirty minutes I would get a call from Bob Phillips.

Q. What would Mr. Phillips on those occasions?

A. Mr. Phillips would talk about the price and how I should price with everybody else in the Tulsa market and not try to take his spot. They wasn't [sic] going to allow it. This was his market. He was taking care of it.

Q. And were you eventually cut off by that supplier?

A. For a period of time we were cut off from Bell, yes.

Q. When did that occur?

A. I believe it was the Spring of 1970.

[Tr. 171] Q. In the Spring of 1970 had you received calls from Mr. Wright and Mr. Phillips to the effect that you have testified?

A. Yes.

Q. How long was it after you received the call threatening supply cut off until it was actually cut off?

A. Two to three weeks.

Q. When you were receiving these various calls that you have testified to, how was your business here in Oklahoma?

A. Volumes were good. Sometimes the profits were not too good.

Q. When you first came into Oklahoma, you opened which station first?

A. One in Tulsa on Admiral.

Q. What factors did you take into count, Mr. King, in deciding to come into the Oklahoma area?

A. Admiral was a busy street. It looked like it had enough customers. It was a new territory for us to expand in and we wanted to make money.

Q. Did you open it as a self-serve?

A. Yes.

Q. Were the prices stable in the Tulsa market when you entered it?

A. Yes.

Q. And when you entered Stilwater [sic], when was that?

[Tr. 172] A. 1967, I believe.

Q. And were the prices stable at the time you entered that market?

A. Yes.

Q. Did you subsequently open other stations in the Tulsa area?

A. Yes, we opened three others, I believe.

Q. And when did you open other Tulsa stations?

A. '67, '68, '69.

Q. And did you open stations in Oklahoma City?

A. Yes.

Q. When did you open stations there?

A. In that same period of time.

Q. How many stations did you open in Oklahoma City?

A. Three.

Q. When you opened in that area were the prices stable?

A. Yes.

Q. What happened, if anything, to the prices in those markets after you opened your stations in the given area?

A. After we were there a short while the price would start down with competitors matching our unbranded price. As they matched it, we would move to what we thought our spots would be. It would move down. The market would go down to the bottom. It would be down for a varied period of time. They would go back up and then start all over again.

[Tr. 173] Q. Did you have situations that were sufficiently prolonged where you would call them price wars?

A. Oh, yes.

Q. And did you have price wars for longer than a month in the Tulsa area?

A. Yes. I don't remember the exact period of time, but there was [sic] times when it was over a month.

Q. In your judgment, Mr. King, what caused those price war situations?

MR. HILL: Your Honor, I object, that calls for speculation on the part of the witness, there hasn't been any predicate laid that he would know why any of these types of things occurred.

THE COURT: Overruled.

A. I believe the temporary price allowance that was used by the majors and the mini [sic] majors to support their dealers and jobbers was one of the principal causes of it.

Q. You have testified that you tried to maintain your differential. Do you believe that your pricing caused the price wars?

A. I do not.

Q. During the period of time that prices were declining in these markets, were you continuing to receive calls from competitors about whether you could maintain a spot?

A. Yes.

[Tr. 174] Q. Is there any connection between those telephone calls and what was happening in the market in your experience?

A. I would say yes because the calls were always, "If you will price at a certain level we can get this market up and keep it up. If you persist in your pricing practices the market will stay down."

Q. Has your company at any time fallen below cost?

A. No.

Q. Did there come a point in time when your stations were hurt by the pricing practices?

A. Yes, definitely.

Q. Did you close some stations?

A. Yes.

Q. Which stations did you close?

A. We closed the station at, I believe it was 3900 North Penn in Oklahoma City, closed one on Lansing in Tulsa, we closed one at McAlester, Oklahoma. We closed one at Mountainburg, Arkansas. We have disposed of two in Oklahoma City.

Q. Did you close—excuse me.

A. We closed at Nowata, Oklahoma, we closed one in Tulsa that was on Admiral Boulevard.

Q. How about your station in Stillwater, Oklahoma, did you close that?

A. We closed it, it was closed also.

[Tr. 175] Q. Approximately what time period are we talking about in the closure of stations?

A. Oh, from late '69 up through '71, '72, on part of them. Some of the others were closed at a later date.

Q. Had you, when you first came in down here, planned to stay in the market for some period of time?

A. Yes.

Q. Had you at one time made some plans to expand or open new station sites?

A. Yes, we had. I looked at a Gulf jobbership to buy it out, not for the brand name but for the service station that they had. I looked at several other locations down

here but with the market and the—the market history that we had had, we decided not to open any more and not to expand in Oklahoma.

Q. How many actual station sites did you go to the point of planning at one time to open?

A. I had six Gulf stations that I had planned to buy and open.

Q. And did you ever open any of those?

A. No.

Q. Were they phantom stations, Mr. King?

A. They were standing on ground.

Q. Were they phantom stations? Is this something that somebody has dreamed up or did you go and look at sites and [Tr. 176] make plans?

A. We actually went and looked at the sites from here to almost the Oklahoma line on Interstate 40.

Q. And when you look at a potential service station site what do you look for?

A. Usually traffic is the key to all of your locations, accessibility. If you have those two figures, then you are looking at volume.

Q. Did you actually, on any of those stations, locate a site and discuss the matter with the owner?

A. We was [sic] taken on a tour of the stations by the owner.

Q. And what was the reason why you closed the stations in Oklahoma, the one in Mountainburg that you testified to?

A. With the depressed prices that we had there was no profiting, we had to cut back our liability in this market area.

Q. And what was the reason why you did not open those stations that you had proposed to open in this area?

A. The depressed markets.

Q. During this entire period of time that your stations were under depressed prices and you were considering closing some of them, were you continuing to receive phone calls about your pricing competitors?

A. Yes.

Q. Did any of them during that period of time talk to [Tr. 177] you about lowering your price?

A. No.

Q. Did they talk to you about raising your price?

A. Yes.

Q. Now, if they tried to get you to raise your price, Mr. King, the reason was you were closing the stations was those prices were down, why didn't you just raise your price?

A. Well, that is not our pricing policy, that is not where we make our profits. Our stations are strictly price stations, they are not fancy or anything, we have to have that spot in the market to do business profitably.

Q. These callers on the phone to you, these competitors, did any of them call and say they wanted your prices up and they would allow you the spot you wanted?

A. No. They would tell me, they would allow me to price with, say, Consumers, or they would allow me at a later period when they put in self-service, they would allow me to price with their self-service prices.

Q. Did some of these self-service operations actually price with you on the penny?

A. Yes.

Q. And as you moved—did you move down to try to take your spot?

A. Yes.

Q. Would they then meet you on those again?

[Tr. 178] A. Correct.

Q. And was one of those companies Consumers?

A. Yes.

Q. Now, was your company injured or damaged by these practices?

A. If taking profits away from the company is damaging it, we was [sic] damaged.

Q. Have you provided your business records, Mr. King, to an accountant to make computations of that damage?

A. Yes, we have.

MR. GIAUQUE: You may cross examine.

THE COURT: Thank you. You may cross examine the witness.

MR. HILL: Your Honor, may we approach the bench?

THE COURT: Yes, you may, sir.

(AT THE BENCH)

MR. HILL: Your Honor, outside the presence of the jury the defendant Champlin would move to strike those portions of Mr. King's testimony relating to the telephone calls by third parties. I have prepared the motion in written form and can just simply give it to Your Honor, or if you like I could read it into the record, whichever you prefer.

THE COURT: Whichever you care to do. Possibly [Tr. 179] it would be easier for you to hand it to me and it would accomplish the same purpose.

Is that the original you just handed the clerk or to me?

MR. HILL: I am handing you the original.

THE COURT: Why don't you hand the original to the clerk and give me a copy.

(PAUSE)

THE COURT: Just for the record, Mr. Giauque, do you have anything to say to this?

MR. GIAUQUE: Only this, Your Honor. We have reviewed the cases cited, that is the Nixon case. We do not believe that correctly states the law. We would refer the Court to the Nixon Watergate case, Halderman [sic] case, and would provide the Court with a citation which is to the same effect as to the Barnett case and others we cited in our trial brief that in an anti-trust case the independent evidence of the conspiracy may properly come in later, that the admissions of co-conspirators may be taken first in point of time and tied up later.

THE COURT: You understand if it isn't tied up, you understand the effect of that?

MR. GIAUQUE: We do, Your Honor, we intend to tie it up directly by the statements of one of the co-conspirators and by the admissions of the party defendant Champlin.

[Tr. 180] THE COURT: Okay. At this time the motion to strike and instruct will be overruled. Of course, in the event you don't believe that he tied it up, I am sure you will urge the Court—you will reurge the same motion to the Court?

All right, now, the clerk has this motion in written form and you are instructed to file the same and, of course, show that it was filed at this time.

MR. HILL: Thank you, Your Honor.

THE COURT: Thank you.

(OPEN COURT)

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[Tr. 181] CROSS EXAMINATION

BY MR. HILL [for Champlin]:

Q. Mr. King, my name is Mark Hill, and together with Mr. Munn and Mr. Bonds, I represent Champlin. You understand that, don't you, sir?

A. Yes, sir.

Q. You and I have met previously, haven't we?

A. Yes, we have.

Q. Do you remember the occasion?

A. When you took my deposition.

Q. Where was that deposition taken?

A. I don't remember the exact location.

Q. Was it taken in Kansas City, Missouri?

A. Kansas City, Missouri.

Q. Was the testimony you gave at that time true?

[Tr. 182] A. To the best of my knowledge, yes.

Q. You testified both yesterday afternoon and this morning about a number of telephone calls that you construed to be efforts to get you to agree on prices, haven't you?

A. Yes, I have.

Q. Did you ever make any such agreements?

A. No.

Q. Did you ever increase the King price because of any fear or threats?

A. When the price had been down for a month or two on the bottom, if the price went up, yes, we'd increase our price.

Q. You increased your price because of fear or threats?

A. Because of loss of profits. We needed to make a profit. You don't operate a business at a loss.

Q. Did you increase your price because you were losing money or because you were afraid of threats?

A. If you have any instance in mind, we have so many instances where our supply was threatened, we would move the price because of that.

Q. At what stations did you move your price because of some fear you had or threats?

A. Probably the Oklahoma markets, which would be Tulsa, Oklahoma City, and the other areas.

Q. On how many occasions?

A. I have no idea.

[Tr. 183] Q. Do you know what price you moved from?

A. No. It would probably be the low twenties.

Q. Do you know what price you moved to?

A. Usually we would try to move 29, 28.9, according to where we thought our place in the market was.

Q. Do you know the dates that these supposed moves took place because of your fear?

A. Beg your pardon?

Q. Do you know what dates, on what dates you made these supposed moves because of fear?

A. No, I don't.

Q. In truth, Mr. King, you have no specific knowledge of any specific occasion you made any such moves because of any fear, do you, sir?

A. If you mean can I pick a date and say on this date we moved because of this threat, no.

Q. Did you ever place calls to other companies to obtain price information?

A. On what? I have placed calls to other companies to see what our wholesale price was from them. I have placed calls to Northwestern that had the North Star brand when we had a sport program from them. I have placed calls to Conoco when we were a Conoco jobber. If this is what you're after, yes, I made those calls.

Q. In your position as being a supervisor over stations, [Tr. 184] did you often or ever take price surveys?

A. Being in the gasoline business, even to this day, I take a continual price survey wherever I'm at.

Q. Do you also direct people to make price surveys?

A. I have directed them, yes.

Q. Why do you do that?

A. To see what the price is in the marketplace.

Q. Don't you want to keep informed as to what the prices are in the marketplace?

A. That's correct.

Q. It makes good business sense to do that, doesn't it?

A. In our position, yes.

Q. Mr. King, do you know what stations are involved in this case?

A I believe so.

Q. Which ones are they?

A. The ones in Oklahoma, Texas and the ones in Arkansas.

Q. Do you have knowledge of any facts relating to some alleged conspiracy to fix the retail price of gasoline in the states of Oklahoma, Arkansas and Texas by

Champlin and some other companies other than what you have gotten secondhand from someone else?

A. Only with my phone conversations and I don't think I testified that I had any calls from Champlin on the Oklahoma market.

[Tr. 185] Q. Let me restate my question and see if you can—do you have knowledge of any facts relating to some alleged conspiracy to fix the retail price of gasoline in the states of Oklahoma, Texas and Arkansas other than what you have heard second-hand from someone else?

MR. GIAUQUE: I object, Your Honor. It's repetitious. The same question. He has answered it.

THE COURT: I don't believe he answered it. Objection overruled.

A. I had phone calls from such people as Mack Wright and Bob Phillips, and the calls would be so close together that when I was threatened with the price, with the cut off of supply or something, I presumed that they were talking to each other.

Q. When did you get this information about phone calls from Mack Wright and Bob Phillips?

A. In '67 and '68, '69 and during the early '70's.

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[Tr. 448] [TESTIMONY OF DEA ENTRIKEN]

[BY MR. GIAUQUE, for King]

Q. All right. Now, would you on occasion come back to the office and find a phone message or a message indicating that more than one person had called in your absence?

A. Oh, yes, yes.

Q. Is P42 an example of that situation where there are a number of names shown?

A. Yes.

Q. Would you identify the various persons shown on that one telephone message?

A. John Whittaker, I believe vice-president of Hudson Oil Company; Norris Stehr; Mickey, would have been Mickey Bowles, I am sure, may have been Mickey Huddleston; Tommy, who was a secretary with an organization that I mentioned, [Tr. 449] SIGMO in Oklahoma City; and Red Murrow, his name is Phil Murrow, I believe, called Red; and a Sally, and that is probably my sister. Oh, pardon me, I have also written on here, this is my handwriting, Sam and Parker.

Q. And who would Sam be?

A. Sam Olson.

Q. From King?

A. Yes.

Q. And who is Parker?

A. The only Parkers that I knew were Bob Parker and his father Kenny Parker with Fina.

Q. All right. Was it unusual for you to come back and find that so many individuals with competitor companies had called while you were out?

A. No.

Q. In a depressed price situation, Mr. Entriken, how much time in your given day would you spend on the telephone market restoration activities?

A. Ninety percent plus.

* * * *

[Tr. 480] Q. Did Dewey Mason ever call King to your knowledge about his prices?

A. Yes.

Q. And were you present at the time that he called him?

A. Yes, I recall a specific conversation.

Q. Was it in the office?

A. Yes, in our office.

Q. About what time please?

A. It was on Charles Page, so I'd say possibly as late as middle of '72 or prior to this time of year—time of day do you mean?

Q. Is that the best you can recall? Was anyone else present other than yourself Mr. Mason from your end?

A. Mr. Mason had been talking to King and there was someone with King whom I found out about.

Q. Was this Sam Olson?

A. It was Sam Olson, yes.

Q. Sam Olson was the local manager, whatever, for the King [Tr. 481] stations, wasn't he?

A. Yes, correct.

Q. What did Mr. Mason say to King as you recall?

A. Hs was talking about prices and I can't at this time recall the specifics of the geography of the move. I don't recall if it was in Tulsa or—and I would imagine that it was Tulsa. Maybe McAlester or some other market, but I walked in just as—and I heard the tail end of the conversation and Mr. Mason hung up and said something, used an oath regarding Sam Olson.

Q. After he used that oath or swore, what did he say?

A. That they—that he was not going to move up. He was not successful with his attempt to get Mr. Olson to move.

Q. Did Dewey Mason from time to time encourage you to call Sam Olson at King?

A. He has, yes.

Q. And what was the purpose for which he wanted you to call King.

A. To get Sam Olson to raise his price.

Q. And did you call King every time that Mr. Mason wanted you to?

A. To the best of my knowledge, yes.

Q. Were there any times when you told him that you needed to wait a while.

A. After the talk, no talk document, was drafted in May of [Tr. 482] '72, I was asked about certain marketers that were on a no talk side, about talking to them and certain of the marketers were discussed. We should talk to them within out [sic—our] company. This

matter was discussed and as a consequence we have seen some were moved to the other side. Now we can talk to them. King wasn't. I do recall Mr. Mason asking me "can you still talk to King"—that for can you still talk to—I don't know if he used the word King or Olson but he was referring to them.

Q. What was your response?

A. As I say I said well, they're on the—I want to be frank about the matter. I was not that reluctant to call King and I could have and I had received calls from King with market surveys.

Q. Sam Olson called you with market surveys?

A. That's correct.

Q. Did he call you frequently?

A Yes, I'd say so. When he was in town, but I questioned this. Can you still have called King or Olson because of the fact that he was on the no talk side. I said well, isn't—is it all right? Is it all right to call him? It was a dire emergency, we had Tulsa all put together, everyone committed and/or up except King and no one could contact him. I said yeah. After a period of time I said well, I will—I did make contact with Sam at that time as I recall.

[Tr. 483] Q. Why did you wait a period of time?

A. The period of time was, that I make reference to, was when I asked Mr. Mason if it was all right to talk to King, can we call them. I was simply—from approximately that time on we disregarded the talk-no talk. I mean, to my knowledge we didn't talk to Price Jones anymore, he was on the no talk side. But, a lot of those on the no talk side, from about that time on we went ahead and talked to them.

Q. When you say from about that time on, my recollection was that it was May 8th of 1972?

A. That is when the document was drafted.

Q. All right.

A. This was subsequent to that.

Q. All right. About how long was it after the talk-no talk document was prepared that you began freely talking with some of the people on the no talk side?

A. I would say a month, six weeks. I freely talked to them immediately, right away, just as soon as if it was drafted, but not—we declined to talk about the same matters that we had been talking about in the past, such as prices, I would take price surveys from people such as Sam Olson, I can recall certain people who called often. The first time they called in I said I can't talk to you.

Q. Was Bob Alves among the persons you told that? [Tr. 484] A. He was, yes.

Q. Now, during this period of time when Mr. Mason asked you if you could call King, had prices been depressed in Tulsa? You say a movement had been put together. I take it prices had been down?

A. Yes, yes, the price had been down, so there was a price restoration, a price fix, then obviously the price would have been down prior to that.

Q. Had this—

A. With one exception. I believe that a price fix could include movement down further. But, normally, yes, the price had been down.

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[Tr. 497] Q. Let's try to focus on a particular incident. You say after the talk-no talk Dewey Mason asked you if you could still talk with Sam Olson. What did you tell him?

A. I said yes.

Q. All right. Now—

A. Okay, I understand you.

Q. Did there come a time when Mr. Mason asked you to call King about their prices and you said in effect not yet?

A. Not that I recall.

Q. All right. So, you don't relate King to any of these instances where somebody has been down and they are not ready to go up yet?

MR. MUNN: Object to as leading.

THE COURT: It is leading.

MR. GIAUQUE: Yes, it is leading.

Q. Is there some analogy in your mind between the Pine Bluff incident that you have recounted for the Court [Tr. 498] and jury and any incident involving King?

A. Yes.

Q. Would you tell us about that, please?

A. Tulsa.

Q. And when was this?

A. The year '71 and '72 constantly.

Q. All right. And would you describe the situation for us, please?

A. I'll clarify the constantly. Every time there was a price war.

Q. All right.

A. I mean during those periods of time, of course.

Q. And would you in those instances call the other competitors and try to get them up?

A. Yes, this was done.

Q. And would you, at the same time you were calling them, would you also call King and try to get them up?

A. I would call him, yes.

Q. Was there some time lag in between your being able to move the others up and when the King organization moved?

A. Yes.

Q. And why was there such a time lapse?

A. Well, it was rather obvious, because obvious that King was going to be the last one up.

Q. You ever recall an incident in your conversations [Tr. 499] with Sam Olson where you told him that the market was going to move up at a given time and that he had to go to a given price and he agreed with you on the phone to move at a given time at a given price?

A. Sam never agreed.

Q. Is it true that over the period of time you tried to get them to move a number of times?

A. Pardon me?

Q. Did you try to get King to move its price up?

A. Yes. And when I say he didn't agree, he would say words to this effect, "I'll take a look at it, it sounds good." He would say, "That sounds good, I'll take a look at it."

Q. Were there instances where everybody else, in fact, moved in accordance with the phone conversations you had been having and King didn't?

A. Yes, I can recall that happening. I can also recall him moving up to less than the normal price, the normal price was 32.9, and that is the only way the Tulsa market is going to stay up, if people such as King came up to 32.9, and I can recall them coming up to 31.

* * * *

[Tr. 656] Q. Is this a tactic that you testified to, is this a tactic that makes it difficult for the independent to compete?

A. They can't compete.

Q. How did you know about all of these Consumer moves?

A. This would be the type information I would have heard from Sam Olson with King, this type thing, Sam would call me on this. * * *

* * * *

[Tr. 704] Q. Now, did Mr. Mason, in your presence, confer with anybody with the Plaintiff King?

A. Yes.

Q. On how many occasions?

A. I believe I testified to one, as I recall.

Q. Were you there on that occasion with Mr. Mason?

A. I came into the office, walked into our office at the conclusion of that telephone call.

Q. Did Mr. Mason relate to you what the telephone call between he and Olson had been?

A. Yes.

Q. Would you tell us, please, what he related to you about that conversation?

MR. MUNN: Your Honor, in the interest of time I object. We have been over this same thing yesterday, and just seems it's a rehash now. He said he just talked about that conversation yesterday, I really don't care if he repeats it.

THE COURT: Honestly, I don't recall if he said what their conversation was after he left. I don't recall that part of it. If he did testify to that, I don't remember it. He may have.

MR. MUNN: I won't make any big deal out of it, but I am trying to move along.

[Tr. 705] THE COURT: I appreciate that.

MR. GIAUQUE: It's very brief, Your Honor.

THE COURT: Go ahead.

Q. Tell us what was said to you, please.

A. On one such occasion Mr. Mason had been talking to a representative of King, Sam Olson. When he hung up the phone I knew that there had been a problem during that conversation by the way that the telephone was hung up. But, he told me, mentioned that, remarked that King or Olson, I don't recall which name was used, was, that so and so King, or Olson, what is the problem, why. He said I have got this whole market up and he won't move. That is the substance, was the substance of that conversation as related to me. The market itself, being known as the Sands Springs line in Tulsa. Charles Page Boulevard, West 3rd Street, coming out of Tulsa into Sands Springs is where our office was located.

Q. And were you aware at the time that Mr. Mason had been working on trying to get the prices up?

A. Yes.

Q. Had he been calling competitors about this?

A. Yes.

[Tr. 706] Q. What happened along that street in the market place after this conversation?

A. That particular strip, market, which was somewhat isolated from the rest of the city, the prices that were up or had been arranged to go up, those stayed down and the prices that were up went back down.

Q. Did the market drop to the bottom?

A. Yes.

Q. Did Mr. Mason tell you he had advised King that if he didn't go up the market would drop back to the bottom?

MR. MUNN: That's leading.

THE COURT: It is a leading question.

Q. Did he say anything to you about what he told Mr. Olson?

A. Regarding that particular occasion, one such—this may have happened more than once—he told Mr. Olson, or King, whichever had been referred to, that this whole thing, being the market, would be right back down on him on the bottom if he didn't move.

Q. Is that what happened?

A. Yes.

• • • •

[Tr. 724] Q. All right. Now, Sam Olson contacts you and asks you if you will tell the truth, and what happened next?

A Well, I told Sam yes at the time, and we were at my home, and I said yes, I'll tell you. I said you already know these things, why do you want me to tell it. I told Sam you already know what happened, why me, why do you want to tell these things. • • •

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[Tr. 755] Q. Is it your testimony that your persuasiveness enabled you to enter into agreements which you now say were undercover price fixing agreements with the following companies, [Tr. 756] Texaco, Mobil, Shell, Standard Oil, Phillips Petroleum, Continental Oil, Vickers, Consumers, Kerr-McGee, Sun Oil, Premir, Fina, DX,

APCO, Bell, Gulf, Derby, Farmland, Exxon, Lion, Williams, Gibble, King, Gas 'N Go, Gas Mart, JOCO, Deep Rock, Sinclair and other independents and jobbers and service stations and dealers?

A. What's the question, please?

Q. Is your testimony that you confided in and conspired with those companies and—

A. No, not all of those.

Q. Which ones do you say you did not talk to about future prices?

A. Of the list you mentioned?

Q. Yes.

A. That I did not talk to about future prices? Now your question is—did I talk to them all about future prices?

Q. Yes.

A. Yes, I have talked to them all about future prices.

Q. Which ones did you not agree with?

MR. GIAUQUE: Would you like the list in front of you?

A. No, this is all right. I recognize one in particular.

Q. Who was that?

A. One in particular that—to the best of my knowledge never gave me a firm commitment that they would move their [Tr. 757] price up at a certain date and time—

Q. Who was that?

A. King.

* * * *

[Tr. 938] Q. When you and Mr. Mason and Mr. Bowles, as you say, got together and decided that there were certain people that you should not converse with in the marketing operations, and that King was one of those, you didn't make up any formal list, it was just written out on a scratch pad in handwriting?

A. It was written out such as that, that is as I mentioned on these documents, Mr. Mason's handwriting, it's really illegible, I know, but I recognize it.

Q. Just on the scratch pad?

A. It's a legal tablet, or legal size, yellow tablet such as we see around the room.

Q. You were told, or you and they decided you should not talk to King at that time, did you not?

A. It was one, yes.

Q. So, certainly you were not told that you should call and threaten him about anything, were you?

A. I had been—subsequent to the drafting of this document I was asked to call, if I could, still call King, can you still talk to King by Mr. Mason.

Q. That's not my question. You can talk to people, we all talk, we visit. You know—

A. This is not talk, okay?

• • • •

[Tr. 941] Q. All right, sir, Mr. Entriken, your testimony beginning at Line 14 on Page 127 reads this way:

Question: "What facts do you base that statement on that it was the filing of the lawsuit which necessitated the drafting of that document?"

Answer: "This Exhibit 1, or whatever it is?"

Question: "Yes."

Answer: "Well, this was—he is the first name, which is obvious, no talk, Price Jones is the first name on the list. He was—and this is—I suppose it is a matter of record in Oklahoma, I don't know. I don't know the attorneys or the courts, or whatever, but he had allegedly sued several oil companies on charges, I think, of price fixing, I don't know, collusion against him, whatever. I don't know, I don't know, but he was, anyway, in the lawsuit business, whatever. I don't know."

• • • •

[Tr. 947] Q. King was in the no talk column. Do you know why?

A. Yes.

Q. Why?

A. We considered King among those, and others, certain others, to be a price cutter, the characterization

was as a—he was a price cutter, they were not—I could say trustworthy, we could not count on them for certain regarding conversations. This is what I was told.

Q. Anything else, were you told anything else?

A. Yes, numerous reasons.

Q. What other reasons?

A. For King and all—they do not always cooperate in market restorations as certain others did who were on the talk side, may have been. Numerous reasons such as this.

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[Tr. 1062] [TESTIMONY OF WILLIAM BELANGER]

Q. [By Mr. Bendinger, for King] By whom are you currently employed?

A. King & King.

Q. When did you commence your employment with King & King?

A. December, 1971.

Q. At that time what position did you assume with King & King?

A. I was a station supervisor.

• • • •

[Tr. 1076] A. Well, Mr. Barksdale [of Triangle] called me and he knew that, of course, that King was a customer of Triangle, he knew that I knew Carl, he told me that he wanted to—he wanted me to talk to Carl and get with Carl about his retail pricing. It centered around, I think, the initial call, probably, he was concerned about Tulsa, I can't be sure of that. It did, it was centered in Oklahoma, but I think Tulsa.

Q. Was there any discussion between you and Mr. Barksdale in that conversation concerning whether Mr. King's prices were too high or too low?

A. No. He called me because he was concerned, he was upset about King's retail pricing.

Q. During that conversation he requested that you call King and talk to him about his pricing?

A. Yes, he did.

Q. What did you do following the conversation?

A. Well, I called King.

Q. What did you tell Mr. King?

A. Well, as I said, I don't remember what geographic area that Mr. Barksdale was concerned about in this original call, but, I don't remember the prices but I did call Carl, and I did talk to him concerning whatever the area was that Barksdale was upset about and whatever the prices were.

[Tr. 1077] Q. The best you recall, what did Mr. King tell you during that conversation?

A. Well, Mr. King told me that—

MR. HILL: Your Honor, I object, that is hearsay. Mr. King is sitting here, he can take the witness stand later and say what he said.

THE COURT: What do you say about that?

MR. BENDINGER: Your Honor, I think that the statement, the testimony should come in by way of completeness of the conversation. I don't think the mere fact that Mr. King is in the courtroom would have anything to do with whether or not Mr. Belanger would have anything to offer what Mr. King said during that conversation.

THE COURT: Overruled, you may continue.

Q. Would you like the—the beginning of the answer read back, Mr. Belanger?

A. Please.

Q. We'll make it simple. What did Mr. King say to you during that conversation?

A. Well, essentially he said that whatever the retail situation was that he would take a look at it.

Q. And following that conversation with Mr. King did you report back to Mr. Barksdale?

A. I did.

Q. And what did you tell Mr. Barksdale?

[Tr. 1078] A. I told him that I talked to Carl and that Carl said that he would just take a look at the retail situation, whatever it was he would take a look at it.

Q. Was this the only conversation you had with Mr. Barksdale concerning his request or request by him that you call King?

A. No.

Q. How many other conversations like that one you just described did you have with Mr. Barksdale?

A. I don't recall the specific number. There were numerous.

Q. Is your recollection such that you can distinguish one of those conversations from another?

A. No, sir.

Q. Generally were the conversations on the same subject as that?

A. Yes.

Q. You just described?

A. Yes.

Q. Were all of your conversations with Mr. King about past prices or current prices?

A. No. The conversations were in either one of two areas. It either had to do with a price increase upcoming, or future increase, or an increase that had happened that King had not gone along with.

[Tr. 1079] Q You mentioned price increase upcoming, what do you mean by that?

A. Well, price in the future, the price is going to go up tomorrow to X cents, whatever it might be, call King and get him to go along with it.

Q. Did Mr. Barksdale ever give you that kind of information?

A. Yes.

Q. In conversations with you?

A. Yes.

Q. And ask you to relay that information to Mr. King?

A. Yes.

Q. Did you, pursuant to that request, do so?

A. Yes.

Q. Did Mr. King, in any of the conversations he has had with you, ever agree to a future price?

A. No.

Q. With regard to the conversations that you had with Mr. Pritchett, by whom was he employed at the time you had those conversations?

A. Kerr-McGee.

Q. In what position?

A. I really don't remember. It seems to me that he was either manager of their branded sales or unbranded sales, and I don't remember which.

Q. Backing up for just a second, did Mr. Barksdale ever [Tr. 1080] tell you during any of these conversations the identity of the company who was going to lead a price move?

A. Yes.

Q. What did he say in that regard?

A. Well, he mentioned that Kerr-McGee was to—at some point was to lead a price increase. He mentioned DX in the same way. He mentioned Phillips in the same way.

Q. And when you were given that information by Mr. Barksdale did you pass it along to Mr. King?

A. I'm sure that I would have.

Q. With regard to Mr. Pritchett, how many conversations did you say you had with him while you were employed by Triangle?

A. The best answer I can give to that is numerous.

Q. Over what period of time did you have those conversations?

A. Well, after the initial time that Mr. Barksdale called me and asked me to talk to King, and I had several conversations with him and he told me then, subsequent at least to the first conversation with Mr. Barksdale, that he would have either Bill Pritchett or Dick Mooney be calling me to contact King.

Q. At the time Mr. Pritchett called you do you know where he was located?

A. I would assume in Oklahoma City. That is where his [Tr. 1081] offices were, so he told me, so I would assume he was there.

Q. And you have had these kinds of conversations with Mr. Mooney as well, is that correct?

A. Yes.

Q. At the time when you had the conversations with Mooney what was his position with Kerr-McGee?

A. Well, he was either in charge of their branded sales or their unbranded sales.

Q. Now, as you sit here today, Mr. Belanger, is your recollection such that you could distinguish between conversations you had with Mr. Pritchett and conversations you had with Mr. Mooney?

A. I couldn't distinguish. They were essentially—well, it was always the same thing, whether they were with Mr. Barksdale, Pritchett, or Mooney.

Q. And how many conversations did you have with Mr. Mooney on this very subject?

A. I couldn't tell you specific. There again, it was numerous conversations.

Q. What was the substance of the conversations between you and Mooney and Pritchett?

A. Well, it had to do with King's retail pricing. And there again, there had either been an increase, there had either been an increase that King had not gone along with, or there was to be an increase and they wanted me to get him to go along with it.

[Tr. 1082] Q. During the conversations with Pritchett and Mooney, were there specific markets identified?

A. Yes.

Q. Which markets do you recall?

A. Well, it was either Tulsa or Oklahoma City, and there were a number of calls about Wichita, Kansas.

Q. In any of these conversations did either Mooney or Pritchett ask you to call King and ask him to lower his price?

A. No.

Q. Were there discussions with Pritchett and Mooney only about past or current prices?

A. No, it would involve up-coming or future retail increases as well as increases that had already happened.

Q. Did either of these individuals, during your conversations with them, identify companies who were going to lead price moves?

A. I don't believe that they did.

Q. Have you met Bob Phillips?

A. Yes.

Q. When did you first meet Mr. Phillips?

A. I believe it was in late 1968.

Q. Where did you first meet Mr. Phillips?

A. At an A.P.I. Convention, American Petroleum Institute Convention in Chicago.

Q. Where was that convention held?

[Tr. 1083] A. The Convention Headquarters were in —was in one of the Chicago hotels downtown and I don't remember which one now.

Q. You were employed at that time by Triangle?

A. Yes.

Q. When you met Mr. Phillips did you know at that time which company he was with?

A. Yes, he was with Bell Oil & Gas.

Q. Was he with anyone else at that time that you met him?

A. You mean did he work for anybody else?

Q. No, I mean at the time you were introduced to Mr. Phillips at the meeting?

A. Yes.

Q. Who did the introductions?

A. I don't—I really don't remember.

Q. Were you introduced to any other oil marketers in connection with the introduction of Mr. Phillips?

A. Yes, I met Bob Phillips and John Barbree at the same time. They were together, this was in the hotel in Triangle's Hospitality Room.

Q. Maybe you could describe generally what the Triangle's Hospitality Room was?

A. Well, at these conventions the refiners, the suppliers, will have a room designated that. They actually advertise them in hotel lobbies and so on. On the Hospitality Rooms, [Tr. 1084] that's what it is, the suppliers or refiners representatives are there and various people of the industry, their customers will come in and visit and that's about it.

Q. Did you know Mr. Barbree at the time?

A. No. That was the first time—in fact, the only time, the first time I met him.

Q. At that time, which company was Mr. Barbree with?

A. I think Mr. Barbree owns, or at least operates, Consumers.

Q. He did at that time?

A. Yes.

Q. As best you recall, would you recount the conversation between yourself, Mr. Phillips and Mr. Barbree at the Triangle Hospitality Room?

A. Well, when I met them I was introduced to them, the subject very quickly came up about King's pricing in Oklahoma. They seemed to be rather upset about it. In fact, they were complaining about it, and the main part of the conversation was they wanted to know if I thought that I could get or arrange for Carl King to meet John Barbree and talk about the retail pricing. I think at that time they were mainly concerned about Tulsa.

Q. Did either Mr. Phillips or Barbree comment on whether they thought King's prices were too low?

A. Well, they sure indicated that they thought that they [Tr. 1085] were. They were rather upset about it.

Q. How was this conversation left?

A. Well, when they asked if I thought that I could arrange a meeting with Carl and Barbree, I didn't make any commitment to them. This was left hanging in the air.

Q. After the meeting did you do anything?

A. Yes.

Q. In connection with their request?

A. I called my superiors in Houston and told them about the conversation and what Phillips and Barbree had suggested and asked them what I should do about it.

Q. What did they say?

A. They said go ahead.

Q. What did you do next?

A. Well, I'm sure I got a hold of—I called Carl and asked him if he would be willing to meet with Mr. Barbree and he indicated that he would, so we arranged a meeting in Tulsa.

Q. The meeting was going to be between whom?

A. Well, with Carl King and as it turned out John Barbree and Mack Wright.

Q. Did, in fact, such a meeting take place?

A. Yes, it did.

Q. Where?

A. Well, I went to Tulsa and met Carl there and we went [Tr. 1086] to John Barbree's office. I introduced Carl to John Barbree. John showed us around the office, around his office.

Q. Now during the meeting in Mr. Barbree's office, was there any discussion concerning King's prices?

A. No, I don't remember any.

Q. And after that meeting in Barbree's office what happened next?

A. Mr. Barbree took us to lunch, I think at the Tulsa Petroleum Club or all men's club and John was there, Carl was there. I was there, and I think Mack Wright also went to lunch with us.

Q. During that luncheon was there any discussion of King's prices?

A. No, I don't remember any.

Q. What happened after lunch?

A. After lunch I left.

Q. Do you know what Mr. King did after lunch?

A. Pardon?

Q. Do you know what Mr. King did after lunch?

A. Well, I know that—

MR. HILL: Object, Your Honor, that's hearsay.

THE COURT: Sustained.

Q. (By Mr. Bendinger) After the meeting with Mr. Barbree and Mr. Wright in Tulsa, did you have any conversations, phone conversations, with Bob Phillips?

[Tr. 1087] A. Yes.

Q. How many?

A. Numerous.

Q. On what subjects?

A. Well, it all had to do with King's prices.

Q. Where was Mr. Phillips located, headquartered, at the time he was making these calls to you?

A. I think Tulsa, but I'm not sure of that.

Q. Where were you headquartered?

A. In St. Louis.

Q. The best you recall, tell the Court and Jury, if you would, Mr. Belanger, what Mr. Phillips said during these conversations, phone conversations with you concerning King's prices.

A. Bob Phillips would call and he would be—he would be complaining that there had been a retail increase, that King had not joined and he wanted me to get King to go up or he would talk about a retail increase up-coming and would want me to call King and inform him of this and get him to go along with it.

Q. Were these pleasant conversations?

A. No, they weren't.

MR. HILL: I object, Your Honor.

THE COURT: Objection sustained, as to the form of the question. It's leading.

[Tr. 1088] Q. (By Mr. Bendinger) Would you describe to the Court and Jury, Mr. Phillips' demeanor or intent during these conversations?

A. Well, it got to the point—

MR. HILL: I object, Your Honor, that calls for an opinion testimony.

THE COURT: Overruled.

Q. You can answer, Mr. Belanger.

A. It got to the point that when Bob Phillips would call me about King's pricing he would get very demanding, he would demand that I have King do this or that, either go up or join a future increase.

Q. Following the conversations with Mr. Phillips, would you call Mr. King?

A. Yes.

Q. What, briefly describe the substance of your conversations with King in relation to your conversation with Phillips.

A. The conversations with Carl in all of these—in all of these times, I would call him about this, the conversations were always very brief. His reply was, I'll take a look at the market, and that was it.

Q. Following your conversations with King, did you report back to Phillips what you and King discussed?

A. I did.

[Tr. 1089] Q. Were you ever able to tell Mr. Phillips that King had agreed to a future price?

A. He never agreed to it with me.

Q. I believe you testified that you had a conversation about King's prices with Mack Wright? Is that correct?

A. Yes.

Q. On how many occasions?

A. There again I can't be specific. They weren't too many but some. I wouldn't know how better to answer it.

Q. Before we get into those, was Mr. Phillips—did he identify a particular market he was concerned about in these conversations with you?

A. He was concerned about Tulsa and one time he called, he called several times about Nowata, Oklahoma.

Q. Did King have stations in Nowata at that time?

A. Yes.

Q. Could you give us the substance of the conversation concerning Nowata?

A. Well, it had to do with King's pricing, retail pricing and he was—King was below the market and Phillips was upset about it. He was complaining about it and wanted me to get King up.

Q. Did you try to get King up?

A. I called Carl and told him that I had the calls, what they—what they were, what Phillips was proposing. [Tr. 1090] Q. His response to you was?

A. Well, I think maybe in the case of Nowata, that after maybe the first or possibly second, I don't recall, Carl suggested that I talk to Sam Olson about that who was King's supervisor in Oklahoma at that time.

Q. Did you do that?

A. Yes.

Q. How many occasions did you—how many occasions did you talk to Mr. Olson about King's prices in Nowata?

A. I would think twice at the most.

Q. What did you tell Mr. Olson in that regard?

A. I told him, Mr. Olson, the same thing that I told Carl.

Q. Did you tell Olson that Phillips had inquired concerning those prices?

A. I'm sure that I did.

Q. What was Mr. Olson's response?

A. It was the same thing as Carl—we'll take a look at it.

Q. Did Mr. Olson ever agree to a future price in a conversation with you?

A. Not with me.

Q. With regard to Mr. Wright, what generally was the substance of the conversations you had with him on the subject of King's retail pricing?

A. These conversations were all the same. There again, [Tr. 1091] it was either to be a future increase

or getting King to go along with it or there had been an increase that he had not gone along with, that he wasn't joining and see if you can't get him to go up.

[Tr. 1092] Q. Following the conversations you had with Mr. Wright did you, in fact, call King?

A. As I remember, I did.

Q. Did Wright in any of these conversations identify particular markets?

A. I am sure he was mainly concerned about Tulsa.

Q. And that is what he told you?

A. As I recall.

Q. What did Mr. King say in response to your conversations after you had talked to Mack Wright?

A. Well, I think I stated a little while ago that the conversations with Carl were very brief, the answers were always the same, "I'll take a look at it."

Q. Mr. Belanger, during any of these conversations that you have recounted here today, did anyone ever ask you to call King and to have him lower his price?

A. No, I don't ever remember that.

Q. Did you ever tell anyone in response to your conversations with King at their request that King had agreed to a future price?

A. No, I don't think so.

* * * *

[Tr. 1100] [TESTIMONY OF SAM OLSON]

Q. [By Mr. Giauque, for King] In your lifetime have you had conversations with Dea Entriken from Champlin?

A. Yes.

Q. Did he relate future price information to you?

A. Yes.

Q. Did he relate information that he had gained from any of the following individuals, Mack Wright?

A. Yes.

Q. Bob Phillips?

A. Yes.

Q. Mr. Mooney or Pritchett of Kerr-McGee?

A. Yes.

Q. Did he purport in those conversations to have information from those individuals and relate it to you as an employee of Champlin?

* * * *

[Tr. 1103] Q. When did you leave Frontier? I'm sorry.

A. In the summer of '68.

Q. And with [sic—which] employer did you then go?

A. With Mr. King.

* * * *

[Tr. 1106] Q. Now the question was, what was Mack Wright complaining about?

A. He was complaining about the retail price of Mr. King's stations in Tulsa and I believe Oklahoma City.

Q. And did he ask you to do anything about that, Mr. Olson?

A. He wanted us to raise our prices and wanted to know if we would be willing to agree to future price moves.

[Tr. 1107] Q. And during this nine month period or so, you are in Kansas City and had some conversations with Mack Wright, did you ever go along with any of his requests?

A. No, we always investigated the things he told us by marking price surveys. We did not agree with him.

Q. When you say you investigated, did you have some contacts with the people in Oklahoma for King?

A. Yes.

Q. And would those price surveys indicate whether or not what Mr. Wright said about a future price move was in fact true?

A. Yes.

Q. That is, if he said a move was taking place, did it in fact take place?

A. Usually, yes.

Q. During this eight or nine month period while you were up there, can you estimate how many times Mack Wright called on that subject?

A. He called several times. I can only remember talking to him personally a couple of times.

Q. And in those couple of times was the conversation essentially the same as you have described?

A. Yes. The only thing I remember other than what I have told you is that there was one point when he called and said that if we were not going to go along with the stable market [Tr. 1108] that they had down in Tulsa that Fina had agreed to buy us out.

Q. Did he indicate that he had some communication with Fina about that?

A. Yes.

Q. And did you ever have any contact, by you I mean you or anyone in King, to your knowledge have any contact by Fina trying to buy you out?

A. Other than what Mack Wright told us, no.

Q. Did you have any subsequent conversations with Mack Wright about being bought out by anyone?

A. Not that I recall.

Q. Did he ever indicate in any conversations with you at any time what would happen if you continued to price as you did?

A. He indicated at one point if we couldn't be bought out, we would be run out? [sic—out.]

Q. Was that in a personal conversation you had with Mack Wright?

A. That was a telephone conversation.

Q. Can you tell us approximately when that conversation took place?

A. It was several months after King had opened his stations in Oklahoma City and Tulsa and I don't know the precise time.

[Tr. 1109] Q. When Mr. Wright threatened to run King out did you tell Mr. King or anybody in the King organization about that threat?

A. I am sure that I discussed it with both Fred and Carl.

Q. Was King already in the Oklahoma market at that time?

A. Yes.

Q. And were its stations competing directly with Champlin?

A. Yes.

Q. Were they competing directly with Mack Wright, Consumers, that is with the Consumer organization?

A. Yes.

Q. And when did you draw the assignment to come to Oklahoma to supervise the operations in the company down here?

A. In March of 1969.

Q. And did you move down immediately?

A. Yes.

• • • •

[Tr. 1111] Q. • • • did you have calls from any other competitors down here [Oklahoma] other than the conversations you have testified to with Mack Wright?

A. Yes, there was a fellow named West that used to call from Oklahoma City.

Q. How do you spell his name?

A. West, W-E-S-T.

Q. Oh, I'm sorry.

A. A fellow named West.

Q. And what company was he with?

A. I think he was self-employed as a broker.

Q. Did he make any complaints about King's retail prices in the area?

A. Yes.

Q. Did he discuss those matters with you?

A. I can only recall talking to him one time and he just indicated that we needed to raise our prices in Oklahoma City and that if we did not we would find gasoline very hard to get hold of.

Q. Do you know for what companies he was brokering gasoline?

A. I believe it was DX.

Q. Did you report that conversation to Mr. King?
[Tr. 1112] A. Yes.

Q. When you reported these conversations about Oklahoma and the pricing of gasoline, supply, did you report to Carl King or Fred King?

A. Both.

Q. Was there any discussion in the King organization at that time of pulling out of Oklahoma because of these threats?

A. No.

Q. All right. Now, you became supervisor, did you, of the Oklahoma territory in the spring, then, 1969?

A. Yes.

Q. Was that your—was that the title, that is, is there an Oklahoma territory or division, or what is it called?

A. The Oklahoma division.

Q. And what was encompassed within King's Oklahoma division when you took it over?

A. He had three stations in Oklahoma City, had two stations in Tulsa, and one in Stillwater.

* * * *

[Tr. 1121] Q. Let's back up for just a minute. When you described the normal market in the Oklahoma area, that is normal as contrasted to what?

A. Well, it's normal because the oil companies had decided that this was the price that they were going to sell gasoline at, and everyone fit into a category, probably, except us.

MR. MUNN: I object to that answer and move to strike it as a conclusion of the witness.

THE COURT: I think it is, sir. The objection is sustained, be stricken from the record.

Q. Would you tell us, please, when you were first advised by any competitor about where King was supposed to fit in that structure?

A. I believe it was Mack Wright who told me where we were supposed to fit.

Q. And how long was it after you came into the Oklahoma area that you had a conversation with Mack Wright on that [Tr. 1122] subject?

A. I am sure he called me right after I got there.

Q. And what did Mr. Wright tell you at that time?

A. He told me that we had a good market here in Tulsa, very solid market, and that he outlined the prices that I have given you as to the majors, and the branded independents, and the private brands. And he recommended that we price our gasoline the same price as the private brand full service the first time.

Q. And what did you tell him by way of response?

A. I just told him that we would not agree to any certain price, that we would price our gasoline as the market dictated.

Q. And what, if anything, did Mr. Wright say in response to your statement?

A. He just argued with me and let me know that that was not going to work.

Q. Did you discuss with him where you thought your company would be pricing?

A. No.

* * * *

[Tr. 1125] Q. And did some of the competitors react to the fact that Gas-Mart and King were both at 29.9?

A. Yes.

Q. What was the reaction?

A. Basically, the reaction was retail prices went down for a month to approximately 22.9 and after that month it went back up and stayed up for a short period of time and went back down again and stayed down again for approximately a month.

Q. During this period of time did you receive any calls from any competitors about your price or the price of other self-serve?

A. Yes.

Q. From whom did you receive such calls?

A. Mack Wright.

Q. By the way, was Mack Wright with the same company, Consumers, during this entire ten year period you were with Champlin?

A. Yes.

Q. What was his position at Consumers?

A. I honestly don't know.

Q. Did he make calls to you during the entire period of time that you were with King in Tulsa?

A. Yes.

Q. Now, on these early calls from Mack Wright, what did [Tr. 1126] he say to you about your pricing?

A. He told us that they could ignore us as long as there was only one station in town that was self-serve, but since Gas-Mart had moved in with three more locations, they would no longer ignore us. So we were going to have to move our prices up to the levels that they dictated or the price would be down from then on.

Q. What was your response to that?

A. I just told him we wouldn't play ball with that.

Q. What price was he trying to get you to go to.

A. He wanted us to go to 31.9.

Q. Did you do that?

A. No.

Q. Did you stay on the 29.9?

A. Yes.

Q. And after that call from Mack Wright, was there some activity of a price nature in the market?

A. Yes.

Q. What happened?

A. Prices went back down.

Q. Is this when it went to 22.9?

A. Yes.

Q. How close is that to your cost at that time?

A. Very close.

Q. Oh, what area did the price go down to 22.9?

A. The entire city.

[Tr. 1127] Q. Did all of the branded independents go down to 22.9?

A. To the best of my recollection, yes.

Q. When the branded independents went down there, were you at 22.9 or were they at 22.9?

A. They were both at 22.9.

Q. They were meeting you on the nose?

A. Yes, sir.

Q. Where were the majors?

A. They were in the vicinity of 24.9.

MR. MUNN: In the interest of clarity, may I ask a voir-dire question? When are we talking about?

THE COURT: Yes, you may.

Q. Would you tell us the period of time, Mr. Olson?

A. 1969, virtually the summer and fall of 1969.

Q. What caused the price to increase from this 22.9 back to some higher level?

A. Well, the oil companies would get together and determine what price that they would want to go and when they would want to go and then they would contact everybody and let everyone know.

MR. MUNN: I object to that and move to strike as argumentative and conclusion.

THE COURT: It's what, sir?

MR. MUNN: Argumentative and conclusive and opinion. The same objection I made earlier.

[Tr. 1128] MR. GIAUQUE: May I follow that up?

THE COURT: Yes, you may.

Q. Did you learn that from telephone conversations with competitors?

A. Yes, sir.

Q. Who told you that was going on?

A. Dea Entriken, Mack Wright, Bob Phillips.

MR. MUNN: Are we still talking about 1969?

THE COURT: Are you talking about 1969?

THE WITNESS: Yes, sir.

THE COURT: Yes. Objection will be overruled.

Q. In those early calls were you getting calls from Mack Wright and Bob Phillips before Dea Entriken entered the scene?

[Tr. 1129] Q. And you heard from Dea Entriken at some time after you were hearing from Wright and Phillips?

MR. MUNN: Objected to as leading.

THE COURT: It is a leading question, objection sustained.

Q. Let me rephrase that. On these occasions in the 1969 period, how frequently would you hear, for instance, from either Mack Wright or Bob Phillips?

A. Fairly frequently, probably three or four times a month.

Q. And in the conversations with Bob Phillips did he say anything about your retail pricing?

A. Yes.

Q. Bob Phillips was with Bell at the time?

A. Yes.

Q. What did Mr. Phillips tell you about your pricing?

A. He told me that we could not continue to price in the manner that we were, that the market would not stand it, and that the marketers would not stand it, if we continued we would find ourselves in a short supply of gasoline.

Q. And was his company a supplier of gasoline to you at the time he made that statement?

A. Yes, he was.

Q. When Bob Phillips would call on that subject did he tell you what area, geographic area he was referring to?

A. Yes.

[Tr. 1130] Q. What would he say in that regard?

A. He would indicate that we had to do something with our prices in the Tulsa area, for example.

Q. Did he on occasion talk about other areas?

A. I think he talked about Oklahoma City periodically as well.

Q. That is, these conversations did have some specific market situations, that is the subject?

A. Yes, that was the purpose of his call.

Q. Would he tell you in these calls about particular prices that they wanted King to sell at?

A. Yes.

Q. Were the conversations with Mr. Phillips about your pricing essentially the same as you have testified you had with Mack Wright?

A. Yes.

Q. Was there any difference in the kind of information that Mr. Wright conveyed to you and the kind Mr. Phillips conveyed to you?

A. No, not really.

Q. Did any of them ever try to get the prices down?

A. No.

Q. Did any of them ever suggest that you should be allowed to price independently?

A. No.

[Tr. 1131] Q. Were they talking about past price situations?

A. Sometimes.

Q. And on the occasions when they did not talk about past situations, what were they discussing with you?

A. Either present price situations or future price moves in the area.

Q. When they discussed with you some present price situations what was the nature of the discussion? By that I mean, let's take one with Bob Phillips, what would Mr. Phillips tell you about the present situation?

A. Well, generally he would tell me that the price, that he knew the price we were posting at a given location in Tulsa and that other marketers in the area were unhappy and that we could not continue to do that.

Q. Did he every identify any of these other marketers that were unhappy?

A. Yes.

Q. Who did Mr. Phillips identify?

A. I can recall Consumers, that's the only one that I can honestly recall that he mentioned by name.

Q. Did Mr. Phillips in any of those conversations with you indicate to you that he had talked with Mr. Mack Wright of Consumers?

A. Yes, many times.

Q. And when Mack Wright would talk with you would he [Tr. 1132] indicate to you that he had had discussions with Bob Phillips at Bell?

A. Yes.

Q. And was there indication in your conversations with either Wright or Phillips that they had in turn talked with competitors?

A. Yes.

Q. And how would they relay that information to you?

A. They would tell me that on a given date in the future that, and in a given time, that various oil companies would be raising their prices to certain levels and they would indicate that we needed to support the move, as they termed it.

Q. Did they specifically ask you to agree to go to a certain price at a certain time?

A. Yes.

• • • •

[Tr. 1139] A. Well, for one thing to get our price advantage, to get our spot back. They had eliminated it and when they eliminated the spot, we just dry up, so I would reduce the price in order to get our spot back and continue to have some customers.

Q. During this period of time, maybe I should establish that period. You described earlier the fall and summer, summer and fall of '69, did the stair step process down to the bottom continue after the early fall of '69?

A. Yes.

Q. For how long a period of time did King experience this market?

A. Until approximately the spring of '73.

Q. What happened in the spring of '73?

A. We had a gas shortage.

Q. Was that the Arab Oil embargo?

A. Yes.

Q. So during the entire period of time, you were in Oklahoma say from '69 to the oil embargo in the spring of '73 the same practice was in effect?

A. Yes.

Q. Now, did you have conversations during this period of time with competitors where the subject of your spot was discussed?

A. Yes.

[Tr. 1140] Q. Did they discuss with you whether they were going to let you have that spot or not?

A. Yes.

Q. That is, did you have specific conversations with them on that point?

A. Yes.

Q. What competitors would talk to you on that subject?

A. Are we talking about the entire '69 to '73 period?

Q. Right. During this period of time who were the people that contacted you about whether you were going to be able to get a spot in anyway?

A. Bob Phillips, Mack Wright and Dea Entriken.

Q. Was it pretty much the same three individuals throughout this period of time?

A. Basically, yes.

Q. And when Dea Entriken would talk with you, would he indicate that he represented that—well, did he represent Champlin, indicate this to you?

A. Yes.

Q. Did he also indicate in those conversations that he had discussions with other competitors?

A. Yes.

Q. And perhaps I asked this before, but during this same period, did Bob Phillips and Mack Wright, when

they talked to you, indicate they had conversations with Entriken?

[Tr. 1141] A. Yes.

Q. And with one another?

A. Yes.

Q. Did they use any terms in the conversations with you that indicated that they were speaking for a number of competitors, that is, more than one company?

A. Yes.

Q. What would they say in that regard?

A. Well, they would just say that they had Conoco committed or Vickers or Champlin, or someone committed to raise this price to a certain level at a certain time.

Q. When did you first receive a call from Dea Entriken?

A. Seems to me it was in the spring of '70.

Q. Could it have been in the summer of '70?

A. Yes.

Q. Did you in the summer or fall of 1970 meet Mr. Entriken?

A. I believe it was in the fall of '70.

Q. Was your first contact with Mr. Entriken by telephone or was it in person?

A. He phoned me.

Q. And what did Mr. Entriken say about who he was employed with?

A. He said he was Dea with Champlin and that he was the whole price man for the area and that he wanted to know if we would like to see a retail price inquiry some gasoline.

[Tr. 1142] Q. Did he specify what area he was talking about?

A. He was talking about Tulsa.

Q. How do you know that?

A. Because he mentioned Tulsa and also one of the competitors in the Tulsa market.

Q. What did Mr. Entriken tell you about the area or other competitor?

A. He just said he had the problem worked out with Sears and they had been the problem, the reason the price was down and he wanted to know if we would agree to a price restoration in Tulsa.

Q. He wanted to know if you would agree with what?

A. Price restoration in Tulsa.

Q. Was that what he called it in the first conversation?

A. Words to that effect if it wasn't those words.

Q. What did you tell him when he asked for such agreement?

A. I just told him that we could get along as long as he wouldn't ask me that sort of question. We would always take a look at the market and react as best we knew in the circumstances.

[Tr. 1143] Q. When Dea Entriken said something about Sears, was there some indication that he had talked with someone at Sears?

A. Yes. He told me he talked with a fellow by the name of Bill Swofford, who, I believe at that time, was the manager over the gas station for Sears.

Q. Sears had a retail station, did it?

A. Yes, 21st and Yale.

Q. Was that station competing with one of the King stations?

A. Yes.

Q. And before Mr. Entriken called had either King or that Sears station been in a depressed price situation?

A. We were in a depressed price situation when Dea called me.

Q. And what did Mr. Entriken tell you about conversations he had had with that other competitor?

A. He had called me and talked to him and they had the problem worked out and that was the reason the price was down because of a particular practice that

Sears had at that time. But he had it worked out and that he wanted to know if we would agree to go up.

Q. And I take it that you did not agree, is that correct?

A. That is correct.

Q. What did he say about that? That is, what did Mr. Entriken respond?

[Tr. 1144] A. Dea was real personable on the phone, he didn't get upset, he just kind of laughed and said "well, okay, you mind if I call you periodically?" And I said, no. And that was essentially it.

Q. And what happened with the Sears price after Entriken's indication to you that he had taken care of the problem?

A. It went up.

Q. Now, was that first call you received from Entriken, then, one that related to a future price move?

A. Yes.

Q. And were you in any way surprised that he would discuss future price moves with you?

A. No.

Q. Had you, by that point in time, had calls from Mack Wright and Phillips on the same subjects?

A. Yes.

Q. How many times, would you say, Mr. Olson, during this '69 through '73 period did Mack Wright talk to you on the subject of your pricing, or future price moves?

A. Many, I don't know how many.

Q. More than a dozen?

A. Yes.

Q. And how many times during that same period would Bob Phillips had called you about your prices or future price moves?

[Tr. 1145] A. Not as many as Mack, but several.

Q. More than a dozen?

A. Yes.

Q. And on how many of those occasions did Mr. Bob Phillips as he was discussing pricing with you, also say something about your supply of gasoline?

A. Probably three of four times.

Q. Were you concerned, during the period Mr. Phillips was discussing this matter with you, that you might lose your supply from this company if you didn't change your prices?

A. Yes.

Q. Did his company in fact, at one time cut off your source of supply?

A. Yes.

Q. And how close in point of time was that supply cut off to a call from Mr. Phillips where he indicated that he might do that?

A. The next day.

Q. Lets focus on that for a minute. When Mr. Phillips called you on that occasion can you put a date or an approximate date on it?

A. I can't really remember.

Q. That is, can you relate it to the supply cut off?

A. It happened the next day, I don't remember the exact [Tr. 1146] time frame when it happened, but it happened the following day.

Q. All right. What did Mr. Phillips tell you on the phone conversation before your supply was cut off?

A. He just told me essentially the same as I have already testified, either that we could not continue to price in the manner that we were, that the competitors would not stand for it, and that we were in danger of possibly not being able to buy gasoline in Oklahoma.

Q. And then the next day, how did you receive notice of the supply cut off?

A. We had a transporter at that time, I believe his name was Penley, and the method that the oil companies used at that time is they would mail bills of lading to the transporter, and the transporter would take those

bills of lading, and they were already printed with the customers name on there and so on, and the transporter would take those bills of lading down to the rack at the refinery and use those as the authorization to withdraw product out for that customer. And the next day I called Penley and asked him to go over and pick up a load of gas for us and to haul it on bale. He called me back later on that afternoon and he said that I have no more loading orders for you on bale, they have not sent them, and indicated that it was very unusual, you know, they [Tr. 1147] had always several on hand, but he said ours had been just allowed to run out and he didn't have anymore.

[Tr. 1148] Q. What did you then do?

A. I called Bob Phillips.

Q. What was that conversation?

A. Well, I just told him that Penley didn't have any more bills of lading and we couldn't load on Bell and he said that he would have some—there was someone coming to Tulsa that evening and that he would have them personally deliver to this fellow and if I would wait until the next day, all would be well.

Q. What happened the next day?

A. I still did not receive them and so I called Bob back and asked him where they were and he said that they certainly would be in the morning's mail. They elected to go ahead and mail them and they never did arrive.

Q. Did you continue to call Mr. Phillips about the problem?

A. I did not call him further. I just hired a local attorney in Tulsa, Harry Henkel, and told him of the situation, told him I felt like we had been cut off because of pricing. He wrote Mr. Phillips a very stern letter and within just a few days we had our bill of lading back to the transport.

Q. In the conversation Mr. Phillips had with you the day before your supply was cut off, did he mention the possibility of it being cut off or any reason other than your [Tr. 1149] prices?

A. No. There was no shortage or anything of that nature at that time.

Q. He didn't say we have to divert the product to someone else temporarily or anything like that?

A. No.

Q. Did he ever threaten to terminate your supply for any reason other than your price activities?

A. No.

Q. And during this same period of time Mr. Phillips called you and then cut off your supply, were you continuing to receive calls from Entriken and Wright with respect to your pricing?

A. I don't think I had talked to Dea yet, but I was talking with Mack.

Q. Had prices in the Tulsa area been depressed immediately prior to this conversation with Phillips?

A. Yes.

Q. Were they trying to get you to do something about the pricing at that time?

A. Yes.

Q. Do you feel they were trying to exert pressure on you?

A. Yes.

Q. Did you, even under those circumstances, agree with them to any future price move?

[Tr. 1150] A. No.

Q. On how many occasions did Mack Wright of Consumers mention to you while he was discussing your pricing the possibility of your losing your supply of gas?

A. I can only recall a couple of times. Those were times when—I'd say in '68 area of time in '69.

Q. Consumers was supplying gas to King wasn't it?

A. No.

Q. Shortly after you had a conversation with Mack Wright on the subject of your supply would you get a call from one of your actual suppliers?

A. Generally it was Bob Phillips that would call immediately after Mack and I had talked.

Q. What did Mack Wright—

THE COURT: I'm having a little difficulty in hearing you. Would you mind pulling that up? Thank you. Go ahead, sir.

Q. What was it that Mack Wright told you about your sources of supply?

A. Well, in the beginning he told us because we were hauling gasoline out of Southeastern Kansas and Southwestern Missouri we would never find gasoline in Oklahoma and then one other time he did tell us that again that we would not find a supplier in Oklahoma for your stations.

Q. Was Mack Wright in these conversations attempting to [Tr. 1151] discourage King from continuing in business in the Oklahoma area?

A. No question about it, even to the extent of talking to other companies about buying us out.

Q. You have testified about the one occasion where he indicated to you that they would, I believe your words were drive you out? Is that correct?

A. Yes.

Q. Did he repeat this threat on more than one occasion?

A Not that I recall.

Q. Did Mack Wright ever indicate to you that if you didn't raise your prices he would contact one of your suppliers?

A. Yes.

Q. On how many occasions did Mack Wright make such a statement?

A. Several.

Q. And do you know whether or not Mack Wright did communicate with Phillips or any one of your suppliers?

A. Yes.

Q. How do you know that?

A. Bob told me he did.

Q. That is in your conversation with Mr. Phillips he said Mack Wright called him.

A. Yes.

Q. What did Mr. Phillips say about that?

[Tr. 1152] A. He said he talked to Mack. He understood there was still a problem with our pricing in Tulsa and that we could not continue to price the way that we were.

Q. And what were you doing during this period of time with your pricing, that is, were you intentionally selling below cost or anything like that?

A. No.

Q. What were you doing with your prices at that time?

A. We were being extremely competitive. We were selling gasoline on our terms as much as possible when we could and that is to be able to take our spot and sell it at our optimum price. We couldn't always do that. We did when we could.

Q. Would you estimate for the Court and Jury, Mr. Olson, how many times during this '69 to '70 period this market phenomena you described occurred? That is, were you pricing 29.9 and they met you, the stair-step down to the bottom? How many times would you say that happened?

A. I have no idea. It is beyond numerous, whatever that term is.

Q. Was this a continual pattern in the market?

A. Yes.

Q. Now after Mr. Entriken called you on that first occasion, did he talk to you later on the subject of your pricing?

[Tr. 1153] A. Yes.

Q. How many calls approximately would you say you had from Mr. Entriken at Champlin during the '69 to '70 pre-period?

A. Over a hundred.

Q. Did you consider Mr. Entriken to be speaking on behalf of companies other than Champlin?

A. Yes.

Q. What would he say in a typical phone conversation with you that would lead you to believe that he discussed the matter with competitors?

A. Generally he would start out by telling me when Champlin was going to move, giving me the date, time and place, and then he would begin naming the other companies that marketed in the area and virtually all of them at one time or another he named, sometimes telling me who he had talked to with those companies.

Q. Did he ever mention in conversations that he talked with Glen Stringer of APCO?

A. Yes.

Q. Dick Grimes with APCO?

A. Yes.

Q. Roger Hines with Conoco?

A. Yes.

Q. Mack Wright with Consumers?

[Tr. 1154] A. Yes.

Q. Bob Phillips with Bell?

A. Yes.

Q. Fellow by the name of Biggerstaff with Phillips 66, did he ever mention him?

A. I don't recall him.

Q. Those names I just mentioned to you, did Entriken over the '69 to '73 period repeat or mention those persons as person whom he had price conversations?

A. Yes.

Q. Now you say he would list various other companies for you. Did he simply tell you who the companies

were or did he indicate that they had agreed with him on the price move?

A. Well, he would indicate they agreed because he would tell me when they were going and what they were going to.

[Tr. 1155] Q. He would tell you that the market was going to move at a certain time in the future?

A. Yeah. In the early going, in '70 he would say, for example, Tulsa is going up at 10:00 o'clock. And then he would say we are going at ten to full normal, 34.9, or whatever it was at the time. And then he would say, talk to Conoco, or Roger Hines, and he would just list all of the marketers that he talked to in that particular situation and say we are going to move at certain times, and at that period most all of them were going up at the same time. But, in later times to avoid suspicion, I guess you would say, they would go up at different times and sometimes even on different days. But, we would still know in advance when they were going and so on.

Q. How many times would you estimate over this period, '70 to '73, would Mr. Entriken tell you in advance of a price move that it was going to take place?

A. Virtually every price move there was.

Q. Did he appear to know what he was talking about?

A. Yeah, he knew.

Q. You have any doubt in your mind that he had been talking with the other competitors?

A. No.

Q. Was there any doubt in your mind that he had been fixing prices?

[Tr. 1156] A. None.

Q. And when he would tell you about a move that was going to take place on that given date and at the time that he indicated, would you go out and check and see what happened in the market?

A. Yes.

Q. Personally do that?

A. Sometimes.

Q. Would you, when you didn't personally do it, have the people under you report what had happened?

A. Yes.

Q. And what did you generally find happened in the market?

A. I found that Dea to be extremely accurate.

Q. In these conversations with Mr. Entriken from Champlin did he always indicate what Champlin was going to do in advance?

A. Generally they were the first ones that he would tell me about.

Q. And did he, on pretty much all of these occasions, tell you what area was involved?

A. Yes.

Q. And would he tell you who was going to move?

A. Yes.

Q. And would he tell you at what price they were all going to move?

[Tr. 1157] A. Yes.

Q. And would he tell you when the move was to take place?

A. Yes.

Q. And would he, on those occasions, ask you on behalf of King to agree to go to a certain price at that time?

A. He did in the early going, but not very often after that.

Q. Did you at any time agree with Mr. Entriken to go to a certain price at a certain time?

A. No.

Q. Did you ever suggest to him that he could tell any customers they could rely on King going to a certain price at a certain time?

A. No.

Q. Why is it, Mr. Olson, if King did not agree to any of these future price moves that Mr. Entriken talked to you over a hundred times during this period?

A. Well, he wanted to solicit my support, he wanted to keep me informed as to what market conditions were.

He also got information from me about retail prices on the street that I observed. And he, I am sure, felt like if he talked to me that we probably would eventually react, whereas if I didn't have the information we might not.

Q. Were there times when you eventually reacted to what was happening?

[Tr. 1158] A. Sure.

Q. That is, you don't contend you never moved up, do you?

A. No.

Q. During this entire period of time that Mr. Entriken was telling you about future price moves was this stair step process taking place in the market that you described?

A. Yes.

Q. And when it got to the bottom, the 21.9 or 22.9, how long would it sit there?

A. Well, depend a lot on the circumstances. It did not always sit there the same amount of time. But, it was always long enough to really hurt, we knew we couldn't sit there forever.

Q. And when Mr. Entriken told you about price moves up that others had agreed to, and it had in fact took place, how would you normally respond to that situation?

A. We would make surveys of the market and determine what our competitors were selling gasoline for, and as soon as the market had moved sufficiently we would react and generally move up also.

Q. On how many occasions would you stay down for a few days and try to recoup volume as you described?

A. Nearly every occasion.

Q. Would competitors call you and complain about the fact that you hadn't followed the move?

[Tr. 1159] A. Yes.

Q. And who were these competitors that called?

A. Usually Mack Wright, Bob Phillips, and Dea Entriken, and Dewey Mason called me a time or two in that regard.

Q. Dewey Mason called you?

A. Yes.

Q. Did a fellow named Jim Ozment ever contact you?

A. Yes.

Q. Was Ozment a competitor of one of your stations?

A. Yes.

Q. And he was an independent also, wasn't he?

A. Yes.

Q. What did Mr. Ozment complain to you about?

A. That we hadn't gone up.

Q. On how many occasions during this '70 to '73 period would you say that competitors' representatives complained to you because you hadn't moved with the market?

A. Many times.

Q. And let's take a typical market move where it goes up. Would it restore all the way back to normal in most cases?

A. Yes.

Q. And in those cases you would stay down for a few days and try to get volume and then you would restore back to what price? Did you ever go to full normal?

A. Oh, yes.

[Tr. 1160] Q. That would be 31.9 or 32.9?

A. Depends on the time, they had an increase on the retail normal price at one point in that '69 to '73 period. One point the normal for us was supposed to be 31.9 and the next time it was 32.9.

Q. When you say the normal for you, do you mean as dictated by you or dictated by somebody else?

A. As dictated by others in the marketplace.

Q. The normal for you was what price?

A. Twenty-nine nine.

Q. All right. Now, if the restoration took place and you went all the way up to, say, 31 or 32.9, describe typically, then, what would happen to your volume?

A. For a day, or two, or three, we would be able to hold onto the volume at that price. And then the volume would begin to decline, and within a week or ten days we had lost a considerable amount of that volume.

Q. And what would you then do?

A. Generally we would reduce to 29.9 to start getting it going the other way.

Q. Now, when you would reduce to 29.9 did Champlin come down and meet you at 29.9?

A. Many times.

Q. Did Champlin on occasion reduce to, say, 31.9 and still give you your spot?

[Tr. 1161] A. In the early stages of '69, and possibly even into the early part of '70 they did on occasion. But, generally after that they met us right on the nose.

Q. If you were allowed your two cent spot on the full service sellers, what response would you see from the public?

A. Well, it would depend on the price level.

Q. Let's say you were 29.9 and the other self-serve stations were at 31.9 or higher, would you get the fair share of the business?

A. Generally.

Q. Was there something about the 29.9 price that the competitors did not like?

A. Sure.

Q. And was it the 29.9 price that they complained to you about frequently?

A. Many times.

[Tr. 1162] Q. What was it about your pricing at 29.9 that apparently upset them as they conveyed to you in the phone conversations?

A. They knew we were going to do a whole lot of business at 29.9. It looked cheaper, it looked a lot cheaper

than what it really was. It just—they knew we were going to do a whole slug of business at that figure.

Q. Did the competitors in these calls tell you especially that they would not let you sell at 29.9?

A. Yes.

Q. Did they tell you that if you tried to sell at 29.9 they would all meet you?

A. Sure. They were chastising us, taking away our advantage.

Q. But, was this something that just happened in the market or did they tell you that in concert they were going to meet you if you tried to take 29.9?

A. Not only did they tell us, but they did it.

Q. Maybe you have already testified to this, but if you moved to 29.9 how long would it take before a majority, say of your competitors, were meeting you on the bottom?

A. Usually one day.

Q. And were these competitors that came to 29.9 also competitors in a normal market did not price together?

A. Yes.

Q. That is, these are sellers that had a difference [Tr. 1163] between them and the normal market? Correct?

A. Yes.

Q. But when you moved to 29.9 they would all move to that price?

A. That's right.

Q. How would you describe, Mr. Olson, King's position with respect to price moves? That is, whether it was first down or last up, last down and first up, or first sideways? Can you describe it for us?

A. We were generally known as the first, one of the first ones down and one of the last ones up.

Q. Why were you one of the first ones down?

A. Well, because the nature of our business was that the only customers we had were the ones that came in and bought from us because of price, so if there developed a

competitive situation in the area or if we reduced our optimum price to hold on to our volume, then we were the ones that went down and near the beginning.

Q. In your experience, how would you characterize Champlin's position on price moves?

A. They were one of the last ones down and usually one of the first ones up.

Q. Did this phone calls to you and the activities of the other companies and talking with one another, did it interfere with you [sic] price independence?

[Tr. 1164] A. I'm sorry.

Q. During this period of '69 through '73 when you were getting calls as you testified from competitors telling you where you had to move and indicating they talked over the matter with one another, did this have the effect of interfering with your independence in setting your own prices?

A. Sure.

Q. How did it interfere with that independence?

A. Well, we usually did not have the resources the larger companies had and so to a great extent we were pretty well forced to do what they wanted us to do a good part of the time.

Q. Did any of the competitors ever indicate to you in so many words that either you agree to go up or they would drive it to the bottom?

A. Yes.

Q. Which competitors indicated that to you?

A. Champlin and Consumers.

Q. And in these conversations with anyone from Consumers, did they indicate they were speaking on behalf of companies other than just Consumers?

A. Yes.

Q. That is, did they use the words we will drive it down?

A. Yes.

Q. On the price moves up did they say we have agreed to [Tr. 1165] go up?

A. Usually they would say something like, at the opening of business on Tuesday next week we are going to restore our stations to normal of 34.9. In addition to us, so and so is going at such and such a time and they would name various other oil companies and so I knew they had talked with them.

Q. On how many occasions did Dewey Mason of Champlin talk with you on the phone?

A. Four or five.

Q. Do you recall the first of those occasions?

A. Not specifically.

Q. Was the subject of those four or five occasions when Mason called you the same?

A. Yes.

Q. Do you recall any one particular conversation that you had with Mason?

A Yes.

Q. About when did this occur?

A. Generally I think it was in either the summer of '70 or '71, probably '71.

Q. How did Mr. Mason identify himself to you?

A. He just told me it was Dewey Mason from Champlin calling.

Q. Did he indicate to you in any way that he was working [Tr. 1166] with Dea Entriken?

A. I don't know if it was that precise conversation or another, but I do know he did mention Dea's name a time or two, that he was tied up or something of that nature and he was calling me instead.

Q. On occasion when Dea Entriken talked to you, did he indicate that he was working with Dewey Mason?

A. He did in the course of our conversation let me know that he worked for Dewey Mason or Dewey's department.

Q. And on this occasion when Mason called you what was happening in the market, were prices up or down or what?

A. The market was in the last stages of a price restoration up.

Q. What do you mean by the last stages of a price restoration up?

A. Well, it was Friday and usually Friday is the last day they either get it up on Friday or it falls back, so it started like I think on Tuesday and it was Friday so it was in the latter stages.

Q. Had the market been down at or near the bottom prior to this call from Mason?

A. Yes.

Q. Had it been down there for quite a while?

A. I don't recall how long. I just know it had been on the bottom.

[Tr. 1167] Q. Was anyone else a party to this conversation between you and Mr. Mason?

A. No, it was a telephone conversation.

Q. Tell us what he said.

A. He said that he had worked the Sand Springs line up; that he had contacted the business men on their service stations on that street and gotten them all to go up. If we did not move our prices within, I believe, an hour that he would certainly be able to take them all right back down.

Q. Did you consider that a threat?

A. Yes.

Q. What did you say?

A. I told him I would drive over and look at the market and that I would be at the West Third Station in 30 or 45 minutes and that if he wanted to call me back he could but I would take a look at it?

Q. What happened? Did you take a look at the market?

A. Yes.

Q. Did you then talk with Mason again that day?

A. Yes, he called me at the station and by this time he was—his patience was gone and he was very demanding. He just said either get it up right now or I'm going to take it right back down.

Q. What did you say on this occasion?

A. I told him to go to hell.

[Tr. 1168] Q. And what happened to the market?

A. The market went back to 22.9 or 21.9.

Q. How long after you told him to go to hell?

A. Probably an hour.

Q. How long would it normally take in the absence of phone calls, would it take to move all of those stations down or up?

A. At least a day.

Q. How many stations were involved in this Sand Springs line situation?

A. Eight or nine.

Q. And did you in that hour or so after you had your last conversation with Dewey Mason go out and survey the market to see what was happening?

A. One of my employees did.

Q. What did he report back to you?

A. That the market had gone back to 21.9.

Q. How long did it stay down?

A. Some time, at least two weeks.

Q. Did you call Mason back on that day?

A. No.

Q. Did you report that incident to your superiors in King?

A. I don't really recall whether I did or not.

Q. Did Mr. Dewey Mason have any later conversations with you about pricing?

A. I think that was the last time he called me.

[Tr. 1169] Q. Had you had prior conversations with Mr. Mason about your prices?

A. Yes.

Q. And in those price conversations was the subject matter generally the same?

A. Yes.

Q. And what did Mr. Mason say to you on those occasions?

A. Essentially the same thing that Dea would say, except that his mannerism was very coarse, very rough, domineering, drill sergeant type attitude. And he would just tell me that Champlin was moving at a specific time and date to a certain price, and that several others were going also and he would give me the information on when they were going and trying to obtain a commitment from me to support the move.

Q. Did you ever give Mr. Mason such a commitment?

A. No.

Q. Any doubt in your mind that he was involved in price fixing?

A. None at all.

Q. Did Mr. Bowles enter into the picture, did you ever talk to him?

A. I didn't ever talk to him.

Q. Did either Mason or Entriken indicate to you that they had cleared anything with Mr. Bowles of Champlin? [Tr. 1170] A. Yes.

Q. Who told you that they had cleared things with Bowles?

A. Dea Entriken.

Q. What was that occasion, do you recall the circumstances?

A. It would happen on several occasions and it usually happened at the time that they went into the Tulsa market with their Harbor operation. Dea had told me that Mickey had, Mr. Bowles had total responsibility for pricing the Harbor stations in the Tulsa market.

Q. Describe when, or tell us when the Harbor operations occurred, first came into being in the Oklahoma market?

A. It was either the fall of '71 or the spring of '72, I am not sure which.

THE COURT Excuse me, I hate to interrupt you, pull that a little closer, you are letting your voice drop and I am afraid the jury can't hear you.

Q. By the way, Mr. Olson, did you experience pricing problems in other markets like the Oklahoma City market similar to what you described in Tulsa?

A. Yes.

Q. When Mack Wright called you, for instance, about your prices, did he on occasion refer to Oklahoma City as well as Tulsa?

A. Yes.

Q. Consumers was competing with you in Oklahoma City, [Tr. 1171] was he?

A. Yes.

Q. And was the pattern of conversations that you had with these competitors about pricing essentially the same for other areas as it was for Tulsa?

A. Yes.

Q. That is, without going through a long series of questions, did they ever ask you to get your prices down in any way?

A. No.

Q. Were they always asking you to get your prices up?

A. Yes.

Q. Were they always telling you where you should fit in this normal situation?

A. Yes.

Q. They always tell you that they had discussed the matter with other competitors?

A. Yes.

Q. You recall any situations, for instance, in Oklahoma City where Consumers met you on the button in this stair step process?

A. Yes.

* * * *

[Tr. 1175] Q. When did the larger companies go into self-serve operations in Tulsa?

A. Seems to me it was in '71.

Q. When they were on their self-serve but operating under their own brand did they price on the button with you?

A. Yes.

Q. Now, when these, when Harbor, Ride, Wa-Lo, and self-serve came in—by the way, was that all about the same time?

A. Yes, they all came in at about the same time.

Q. Was this after you had received a number of calls from competitors trying to get you up?

A. Yes.

Q. How many calls would you say you had from Consumers, Champlin, or Bell, or any competitors trying to get your prices up before they came in here with private brand self-service operations?

A. Hundreds.

Q. And when they came in with those kind of operations what effect did it have on your business?

A. We lost volume and profits.

[Tr. 1176] Q. Did you hear—strike that.

Did Entriken, or Phillips, or Mason, or Mack Wright ever indicate to you that they would use one of these private brand operations as a means of driving prices down?

A. Entriken.

Q. What did Entriken tell you in that regard?

A. That they were going to market with us and that we were in a sense being punished for our marketing practices in the past.

• • • •

[Tr. 1180] Q. Do you know whether the Detroit Plan was ever given affect in the Tulsa marketing area?

A. Yes.

Q. And how did you learn of that?

A. Dea called me and told me that Texaco had put in a Detroit Plan in Tulsa.

Q. Did he indicate to you that he had learned that from someone in Texaco?

A. I don't recall exactly how he told me he knew it. I do know that he told me he had discussed it with Mack Wright, but I don't know whether he had told me that Texaco had told him that or not.

Q. And when Mr. Entriken told you about the Detroit Plan, was he telling you that it had gone into effect or he had heard that it was going into effect?

A. It was already in effect. Texaco was 28.9. The rest were down to meet that price at that time.

* * * *

[Tr. 1184] Q. And did you thereafter talk with anyone else in Champlin about getting a supply?

A. Later I talked to Mr. Entriken regarding getting a supply of gasoline through Champlin.

Q. Entriken was not in the supply department, was he?

A. No.

Q. Why did you ask Mr. Entriken about supply?

A. Well, I felt like if I had gone direct to the people that were in supply I would have received the same answer that I had out of the refinery and I had received some information regarding a possible lube oil deal with Champlin, if you bought their lube oil, you could also be supplied with gasoline, so I inquired of Dea if he was aware of that and if he would see if he could use some influence to talk to some of the people in their supply department into supplying us.

Q. Did he get back to you on that matter?

[Tr. 1185] A. Yes.

Q. What did he say?

A. He just kind of laughed, he just said there's no way that they're going to supply a price cutter like you.

Q. Did you—how many times during this period did you ask Champlin for supply to either Entriken or someone else?

A. I believe it was three times that I asked Dea about it and the times that I have testified to with the refinery.

Q. Was one of those times in the same time period where you were soliciting supply from DX and Phillips and the others you mentioned?

A. Yes. The times that I went out to the Champlin Refinery at Enid was also supplying at that time others.

Q. And did they all refuse you within the same, say, two or three months?

A. Yes.

Q. And prior to this time that the various companies, including Champlin, refused to supply, had you been receiving complaints from competitors about your pricing?

A. Yes.

Q. Did Triangle supply you at one time?

A. Yes.

Q. And was there a time when Triangle, in addition to Bell, cut you off from supply?

A. Yes.

[Tr. 1186] Q When was that, do you recall?

A. I don't recall the exact time. It seems to me it may have been in '71.

Q. Triangle is a company affiliated with Kerr-McGee, is it?

A. Yes.

Q. And did you know Mr. Barksdale in Triangle?

A. I did not know him. I knew of him.

Q. And were you ever advised that someone in Triangle had complained about King's pricing practices?

A. I know that people from Triangle had called the Kansas City office in regard to our pricing in Oklahoma.

Q. You learned that from conversations with King?

A. Yes.

Q. All right. Now, what was the impact if you can tell us in your own words, Mr. Olson, of this price coordination if we can call it that on King's business? How did it effect your volume and your profit in the Oklahoma area?

A. Well, it kept us from selling at the optimum price and maximizing our profit. It had a very negative effect upon our volume. It had a very negative effect upon our profits.

• • • •

[Tr. 1199] Q. All right. Now, can you tell us since you were the supervisor in the area and the man most directly affected by the practices was King in your judgment, directly impacted by the market collusions that you have testified to?

A. Yes.

Q. And did it adversely affect volume, profit and plans?

A. No question about it.

[Tr. 1200] Q. And was the impact substantial?

A. I'm sure it was.

Q. These station sites that you looked at, did you consider them all to be good potential sites?

A. Yes.

Q. If you were to compare them with, say, Bethany, or North May, or your East Admiral station, do you think that they had the potential for volume and profit that those three existing stations had?

A. I think they had more potential because of the market conditions.

Q. You have not been involved, have you, Mr. Olson, in the financial computation of money damages of King in this case, have you?

A. No, I have not.

Q. In addition to talking with Dea Entriken about the pricing matters you testified to, you also made arrangements with Dea at one time, did you not, to obtain some of his records or journals of his activities?

A. Yes.

Q. When was your first contact with Dea Entriken with respect to any of those records that he kept?

A. Oh, I went down to Dallas and met him, I don't remember exactly when it was, but it seems to me it was in '73 sometime.

[Tr. 1201] Q. What motivated you to go down and see Dea on that occasion?

A. Well, I wanted to see if he had anything that would shed some light on some of his practices when he had been employed by Champlin.

Q. Was King at that time considering taking some legal action to protect its interest?

A. Yes.

Q. And was there any discussion between you and Dea to that effect?

A. Yes.

Q. When you met with Dea in Dallas on that first occasion did he discuss activities with you?

A. Oh, yes.

Q. Did he tell you he had been involved in price fixing at Champlin?

A. I don't know that he specifically told me, it was a common known thing between he and I and everyone else in the marketing of gasoline in Oklahoma.

* * *

[Tr. 1207] Q. This is not the first of Mr. King's anti-trust suits against competitors of his on which you have had occasion to work, is it?

A. No.

Q. You have had prior testimony experience, you have testified before?

A. In a deposition, yes.

[Tr. 1208] Q. In King's, in their case you have testified by deposition before, haven't you?

A. Yes.

Q. And you also testified by deposition in other Anti-Trust cases of King?

A. One other.

* * * *

[Tr. 1215] Q. Did many people call you or other King representatives complaining to you about your policy of trying to sell under everybody in the market?

A. Yes.

Q. Did many people undertake to meet your newly instituted policy of trying to sell under everybody else in the market?

A. Yes.

Q. Who all called you and complained about King's low prices?

A. Mack Wright, Bob Phillips, Dea Entriken, Dewey Mason.

Q. Only those four?

A. No, I'm sure there were many others, those were the ones that called me the most.

Q. How many others?

A. Probably ten or fifteen.

Q. Were all of those calls by people, attempting to persuade you to keep prices up rather than to lower them?

A. Well, they were trying to persuade us to keep prices [Tr. 1216] in line with the normal prices that had been established by them in the industry.

Q. Did you ever have any calls from any of those people asking you to lower your prices?

A. No.

Q. What price was it that you wanted to sell at?

A. Well—

Q. Let's say regular gasoline?

A. Depending on a number of factors, assuming that the—assuming that the majors were at 36.9, or 34.9, and independents were at 32.9, the private brands at 31.9, we were wanting to sell at 29.9.

Q. You wanted to sell at two cents under all of your competition, and at several cents under each of them, is that a fair statement?

A. Yes.

Q. Did you ever receive any calls complaining about your prices from a man named Price Jones?

A. Yes.

Q. Who was he?

A. He was a gasoline marketer in Oklahoma City.

Q. Did you ever make any agreements with Dea Entriken, or Price Jones, or Mack Wright, or any of these other people that you say called to get prices up?

A. No.

[Tr. 1217] Q. If the efforts which you say they were making to get prices up had been successful, that would have helped King Gas and Oil, would it not?

A. No.

Q. Their efforts in that regard concerning retail price moves in Tulsa or Oklahoma City, or the State of Oklahoma, didn't damage the King companies, did it?

A. Well, as I testified earlier, it helped on a temporary basis, and then it began to—they began to erode out volume to the point where it became unprofitable for us to remain at those higher levels.

Q. Could anyone elses efforts of which you are aware to get prices to move upward damage any of the King companies?

A. Everyone that was involved in the conspiracy I am sure did.

Q. Are you aware of anyone?

A. I am aware of the phone calls, of the fact that they talked to each other, of the resulting action, yes, I would have to say that I am aware of all of them.

MR. MUNN: May I approach the witness?

THE COURT: Yes, you may.

Q. Mr. Olson, I want to ask if you gave this testimony under oath, testifying in the Nebraska case that Mr. King brought. I am reading from page 1111, beginning at line 2.

[Tr. 1218] Question: "Now, the calls that you would get from your friend, Dea Entriken, —Dea Entriken is a friend of yours, is he not?"

Answer: "Yes."

Question: "Price Jones is a friend of yours?"

Answer: "No."

Question: "Is Mack Wright?"

Answer: "No."

Question: "All right. The calls that you would get from your friend Dea Entriken, and your acquaintances Mack Wright and Price Jones always referred to movement of prices upward, or a failure of efforts being made to approve prices upward, isn't that true?"

Answer: "Yes."

Question: "And while you would not make agreements with these gentlemen, you recognized if they were successful in their efforts to get prices up that helped King Gas and Oil, didn't it?"

Answer: "Yes."

* * * *

[Tr. 1232] Q. Was one of your purposes in keeping that diary [of gasoline price changes] to protect yourself against Carl King and justify to him your price reductions at your stations?

A. Oh, that might have had a small bearing on it, yes.

Q. After you started keeping the diary did you have any general practice regarding when you made entries in it?

A. I'm sure I did. I cannot recall at this time.

Q. Did you keep it with the thought in mind that it might be useful in a situation like this? That is, in one of Mr. King's anti-trust cases?

A. I am sure that crossed my mind.

* * * *

[Tr. 1294] Q. Do you claim that Dea Entriken ever threatened you?

A. In a gentle sort of way, yes.

Q. In your diary kept over a two year period I did not find a single instance where you recorded the reason for [Tr. 1295] price increase to be a threat. Do you know of any in there?

A. If I had written down all of the times that I felt threatened by Dea, or Champlin, or Mack Wright, or

Bob Phillips, it would have been nearly an everyday occurrence.

* * * *

[Tr. 1339] Q. Did Fred King ever tell you that you ought to be talking to your competitors to find out market conditions in the market in which King marketed?

A. He may have, I really don't remember.

Q. To refresh your recollection, let me let you look at Page 233 of your deposition and read what I have highlighted in yellow.

A. All of the area in yellow?

Q. Yes.

A. Who was it that told you you should be talking to your competitors to find out market conditions in the markets in which King markets?

I believe that was Fred King.

Was he your superior or one of them in the King companies?

Yes.

Q. You remember that now, don't you?

A. Yes.

* * * *

[Tr. 1342] Q. Uh, who is a company called Walco?

A. A gasoline marketer in Houston.

Q. Do they operate any type of particular gasoline operation?

A. I believe they were self-service.

Q. Who owns Walco?

A. I don't know.

Q. Do you know any of the employees or officials of Walco?

A. No.

Q. Do you know from whom Walco bought its gasoline?

A. I believe they were supplied by Conoco.

Q. Now you testified, did you not, during your deposition that the retail being dropped by Walco in Houston

was a direct result of an agreement that they had with Champlin. Do you remember that testimony?

A. Yes.

Q. Who in Waleo do you say made an agreement with Champlin?

A. I don't know the people with Waleo. I have already testified to that, but I don't need to know that to know there was an agreement.

Q. Who do you say in Champlin made an agreement with [Tr. 1343] Waleo?

A. It could be any one of the three that I testified to.

Q. Do you know?

A. I know that Mr. Entriken did talk to various marketers in the Houston area and that he did fix prices there as he did in other areas, so it's reason to assume that he had those agreements there the same as he did in Oklahoma.

Q. Do you really know whether there was ever even any conversations between Mr. Entriken and anybody that ever worked for Waleo?

A. He has mentioned their name to me.

Q. He mentioned their name?

A. And he has talked to them.

Q. When do you say that Dea Entriken and Waleo entered into some sort of a price fixing agreement?

A. I don't say when. I'm saying it existed and I don't have any factual knowledge of when they entered into that agreement.

MR. MUNN: That's all.

THE COURT: Redirect examination.

REDIRECT EXAMINATION

BY MR. GIAUQUE:

Q. Mr. Olson, you will recall just a moment ago you were ask whether your diary contained any entries about Champlin or Harbor that Mr. Munn didn't ask you about? [Tr. 1344] A. Yes.

MR. MUNN: Object to that, Your Honor. He objected to the question and you sustained it.

THE COURT: I think that's right.

Q. Now I'd like to go through this page by page with you and cover the ones that weren't covered. Would you look at the diary again, please, and while we are going through this, every mention of Harbor is the same as Champlin, isn't it?

A. Yes.

Q. Champlin is Harbor as far as you recorded the information, isn't it?

A. Yes.

Q. Harbor came into the market some time late in the game, didn't they?

A. Yes.

Q. And did Harbor compete on price?

A. Yes.

Q. And did Harbor compete, as you observed, by meeting you on the button or on the nose?

A. Yes.

Q. Now did Mr. Entriken discuss with you in telephone conversations that he had had discussions on price with people from Sinclair?

A. Yes.

Q. Consumers?

[Tr. 1845] A. Yes.

Q. Gulf?

A. Yes.

Q. DX?

A. Yes.

Q. Shamrock?

A. Yes.

Q. Now would you go to your entry of May 19, 1972?

A. Yes.

Q. Before I ask you a specific question about this, Mr. Olson, does your diary include entries for 1969 at all?

A. No.

Q. Does it include entries for 1970?

A. No.

Q. Does it include any for the year 1971?

A. No.

Q. Does it include any for the first three or four months of 1972?

A. No.

Q. Why don't you look at the last entry in 1972 and tell us what that is?

A. I believe it was on the 25th of Setpember of 1972 is the last entry that was made.

Q. So what we have in the diary for 1972, we don't have anything prior to this or for 1972. We have the period from [Tr. 1346] April 15th is the first entry I have through September 26th, is that correct?

A. Twenty-fifth, uh-huh.

Q. Twenty-fifth?

A. Yes.

Q. Do we have a little less than six months, isn't that true?

A. Yes.

Q. Then you don't have any entries for the rest of the year 1972? Correct?

A. That's correct.

Q. So the diary is not a complete record of your price moves from 1969 through '73, is it?

A No, it is not.

Q. In fact, through the end of '72 it's only six months of the three and a half years, isn't it?

A. Yes.

Q. Let's look at the six months and see how many times Champlin is mentioned. Look at April 15th, please. Do you have an entry about a Mr. Martin. You say he reduced price sharply which continued to drive our price down. Martin is a competitor, wasn't he?

A. Yes.

Q. Entriken tell you he talked with Martin?

A. Many times.

• • • •

[Tr. 1348] Q. I show you what has been received in evidence as Plaintiff's Exhibit 5. Martin is one of those that appears on the talk-no talk document on the right-hand side, isn't he?

A. Yes.

Q. Let's go down this. Did Mr. Entriken in these conversations with you tell you that he had discussions on future prices with Gas-n-Go?

A. Yes.

Q. With Travis and Ernie Majors?

A. Yes.

Q. With Bob Parker at Fina?

A. Yes.

Q. With John Whittaker at Hudson?

A. Yes.

Q. With people in Triangle?

A. Yes.

Q. With people in Lyon?

A. Yes.

Q. Super?

A. Yes.

Q. Did he ever mention that he had conversations with a Red Murrell?

A. I don't recognize the name.

Q. Okay. Roger Hines of Conoco?

A. Yes.

[Tr. 1349] Q. Did he mention that he had been discussing prices with people at Mobil?

A. Yes.

Q. Did you discuss conversations he had with people in Freeway?

A. Yes.

Q. Freeway was a competitor of both Champlin and King, was he not?

A. Yes.

Q. And he mentioned that he had conversed with Mack Wright and others at Consumers, did he?

A. Yes.

Q. Did he mention that he had conversations with people in Kerr-McGee?

A. Yes.

Q. And Fina?

A. Yes.

Q. And Vickers?

A. Yes.

Q. Did he mention that he had had conversations with people in Mars?

A. Yes.

Q. Did he mention Myron Cooplo with Mars?

A. Yes.

Q. Did he indicate to you that he had fixed prices with [Tr. 1350] Myron Cooplo at Mars?

A. Yes.

Q. Did he indicate that he had conversations with Mr. Ozment on future prices?

A. Yes.

Q. And people at Thrift?

A. Yes.

Q. U-Tote-M?

A. Yes.

Q. Did he mention that he had had conversations with people in Xris, Christopher?

A. Yes.

Q. And Curtsinger?

A. Yes.

Q. And finally did he mention that he had conversations with Marine Oil Company?

A. I don't recognize that name.

Q. But Mr. Martin, that appears next to Marine, he did indicate he had conversed with him on prices?

A. Yes.

Q. Now, look at that April 15th entry. The diary indicates that Martin sharply reduced their price which continued to drive our prices down. By Monday, April 17, '72, we had reduced our prices to 21.9 and 23.9. Now, that is below cost, isn't it, or at about cost?

[Tr. 1351] A. I believe it is below cost.

Q. Had you been driven right to the bottom at that point?

A. Yes.

Q. Due to Ray Martin dropping 23.9, Gulf-Mart dropping to 21.9, Target dropping to 21.9, and Consumers dropping to 23.9? Now, those are all companies with whom Entriken had been discussing prices, isn't that true?

A. Yes.

Q. And he told you that?

A. Yes.

Q. Now, is that an example of the bottom of this stair step process that you have described?

A. Yes.

Q. That is, you didn't voluntarily go down to 21.9 and 23.9 except as people were pressing you down, did you?

A. That is correct.

Q. Would you go now to the entry on May 19th, on a Friday. It indicates in Oklahoma City, does it not, that you had on that day been at a price of 28.9 and you were met by Sinclair, Consumers, Gulf, DX, and Shamrock on the button at your 28.9 price, is that true?

A. That is true.

Q. Now, how is it that all of these companies simultaneously moved at the same price?

A. Because they have talked to each other.

[Tr. 1352] Q. And you say because of this you then reduced your price to 27.9?

A. Yes.

Q. Why did you do that?

A. To try and maintain some differential so we could hold onto some of our business.

Q. If you sold at 28.9 very long with Sinclair, Consumers, Gulf, DX, and Shamrock what would happen to your volume?

A. It would completely dry up.

Q. And have you had enough experience with that phenomena to testify from personal knowledge that that is what would happen?

A. Yes.

Q. Would you look at June 16th on a Friday, again, please. By the way, in Kerr-McGee, did Mr. Entriken ever mention that he had had conversations with some fellows named Pritchett and Mooney? Those names ring a bell?

A. Mooney, not Mr. Pritchett, I know who Pritchett is, but I don't believe Dea ever told me he had a conversation with Pritchett.

Q. Did Dea tell you he talked to Mooney and someone else at Kerr-McGee?

A. Mooney and Don Sawyer.

Q. Did he indicate that Kerr-McGee had given him some assurance when they would move prices?

[Tr. 1353] A. Yes.

Q. Looking at this entry on June 16th, on a Friday, you say that on May Avenue in Oklahoma City you moved to 27.9 because Kerr-McGee had met your price on the nose of 28.9, is that correct?

A. Yes.

Q. And then you had to drop again to 26.9 because DX then came in and made it 27.9, is that correct?

A. Yes.

Q. And is this an example of the stair step process you described?

A. Sure is.

Q. Did the companies sometimes take turns rather than all meeting you on the button at the same time?

A. Sometimes.

Q. You then say that you reduced your price at Bethany to 27.9 because Consumers met your 28.9? Was Consumers meeting, then, on one of your stations the same price that Kerr-McGee had met in another city on another of your stations?

A. Yes.

Q. Now, how is it that Consumers in one city meets the same price of yours that Kerr-McGee is meeting on the same day in another city?

MR. MUNN: I object to letting the witness [Tr. 1354] argue this point, it's been gone over and over and is repetitious, improper.

THE COURT: What is your reply?

MR. GIAUQUE: Pardon me, Your Honor?

THE COURT: Your reply?

MR. GIAUQUE: If he knows, if he knows how that happened, Your Honor.

THE COURT: If you know how that happened you may answer, overruled.

A. Because they talked.

Q. And during that period of time were you conversing with Mr. Entriken and he was relaying this information to you?

A. Yes.

• • • •

[Tr. 1356] Q. Now on Tuesday, July the 11th, would you look at that?

A. Yes.

Q. Here you're meeting, you're reducing your price at Admiral and Sheridan to meet Hudson and Consumers who had dropped down to 25.9, is that correct?

A. Yes.

Q. And that's John Whitaker, and that's Mack Wright, is it not, that control those companies' prices?

A. Yes.

Q. Are those two companies frequently Mr. Entriken would tell you he had reached a price agreement with?

A. Yes.

Q. You show on this same date that Ozment, Harbor and American had met you at 23.9, is that correct?

A. Yes.

Q. Did you have conversations with Mr. Entriken on the [Tr. 1357] subject of Harbor's pricing of gasoline?

A. Yes.

Q. Did he tell you whether he had any authority whatever with respect to the Harbor prices?

A. He said that he could not control those, that Mickey Bowles controlled those.

Q. How many Harbor stations were there in the general area of competition with King?

A. There were several. I'm not sure how many.

Q. Were there so few that you could disregard what they were doing?

A. No.

Q. Were there so many that you had to take into account what they were doing?

A. Yes.

Q. If you didn't meet Harbor, what would happen to your volume?

A. It would suffer.

Q. Let's look at Wednesday. I'm sorry, Thursday, July the 27th. There you reduced price, did you not, to meet Harbor, Consumers, Hudson and Huff?

A. Yes.

Q. Who's Huff?

A. They're a private brand marketer in Tulsa.

Q. And did Mr. Entriken indicate to you from time to time [Tr. 1358] that he had conversations with Huff about pricing?

A. Yes.

• • • •

[Tr. 1363] Q. All through this month of September Consumers was meeting you on the button, were they not?

A. Yes.

Q. Were you losing volume to Consumers as a result?

A. Yes, sir.

Q. During this period of time was Mr. Entriken in communication with Consumers?

A. Yes.

Q. Was there any very extensive period of time, say two or three months, when Mr. Entriken was not in communiction with these competitors?

A. No.

• • • •

[Tr. 1365] Q. Hudson, Huff, Consumers, Shamrock, Super Swift, all at 25.9, and then you show Kerr-McGee and Derby, 26.9. Are all those companies Mr. Entriken told you he was communicating with on future prices?

A. Yes.

Q. All right. February 1, did you meet Harbor on that day, did you go down because of Harbor's price?

A. Yes.

Q. That is in Tulsa?

A. Yes.

Q. Nobody else is shown on that day, is there?

A. No.

Q. Let's go to February 12th. You went down at some of your stations in Tulsa, did you not, to meet the prices of Consumers, Shamrock, Hudson, Harbor, and Huff, is that correct?

A. Yes.

Q. All of those again are companies Entriken had been communicating with, true?

A. Yes.

Q. Did you consider the Harbor stations to be a serious competitive factor in your market?

[Tr. 1366] A. Yes.

Q. On March 6th, Tuesday, counsel called your attention to this, it shows Champlin. You lowered your price because Champlin had reduced off of its normal, is that true?

A. Yes.

Q. And then on March 13th you are reducing prices again in Tulsa to meet the same group, Super Swift, Hudson, Huff, Harbor, and now a couple of new ones,

Git-n-Go and Save-a-Dollar are also in there? Were they competitors of King and Champlin?

A. Yes.

Q. And did Mr. Entriken ever indicate to you whether he had communications about pricings with Git-n-Go and Save-a-Dollar?

A. Yes.

Q. When I say communications with them about pricing, I mean future prices, you understand that?

A. Yes.

Q. Did Mr. Entriken in his conversations with you disclose any particular companies that he had tried to involve in price fixing that he had been unable to?

A. He said that Texaco was difficult.

Q. What did he say about Curtsinger?

A. Curt was real tough.

Q. Did he identify anybody else who didn't go along? [Tr. 1367] A. Not that I can recall.

Q. By that I don't mean to suggest that King didn't go along. Was King going along?

A. No.

Q. All right. Now, I take it if King had gone along there wouldn't be all of these price reductions, would there?

A. That's right.

Q. Now, let's look at Monday, April 2nd. You reduced prices again on your West Third in Tulsa because of Harbor and some of the others, isn't that true?

A. Yes.

Q. And on Monday, April 9th reduced again in Tulsa because of Harbor, Consumers, and Shamrock, isn't that true?

A. Yes.

Q. So, whether we call it Champlin or Harbor in this six month period which is all you recorded for '72, you got more than two dozen times you reduced to meet Harbor, didn't you?

A. Yes.

MR. MUNN: I object to that, Your Honor, it is a mischaracterization, there are not two dozen times in that record that he says he reduced to meet Harbor, he is including other people that this man says reduced because of conversations he says they had with Entriken. [Tr. 1368] THE COURT: Well, he answered yes. There may or may not be two dozen, I don't know, but he answered yes.

Q. If we took the instances where you reduced to meet Champlin, Harbor, and other companies that Entriken had told you he was fixing prices with in this six month period, it would be far more than 24, would there not?

A. Yes.

Q. By the way, your first entry where you said that Martin had been driving the prices down, was Friday, May 19th—I'm sorry, it was Saturday, April 15th, you say Martin had been driving the prices down. Is Ray Martin that is shown on the talk-no talk document, is he different than Martin Oil Company that also appears on there?

A. Yes.

Q. Did Mr. Entriken tell you that he had communications about future prices with both Martin Oil Company and Ray Martin?

A. Yes.

Q. All right. Now, you were asked questions—excuse me, strike that.

I would like now for that time period that we have just reviewed in the diary, to ask you some questions from some of Mr. Entriken's records that are in evidence in the case. He indicates in P33 that he had communications [Tr. 1369] on future prices with Gibble, Bell, and Samaco.

MR. MUNN: Your Honor, I object to counsel summarizing the exhibits in evidence in his question.

MR. GIAUQUE: All right, let me rephrase the question.

P33, Mr. Entriken's record, dated 12-22-72, is a phone message from a Wally Hudson, you ever heard of him?

A. That doesn't ring a bell.

Q. There was testimony that he was with Champlin. But, in any event, the document says, "Gibble, Bell, Samaco, Parks and Shamrock at 24 and 25. Will 31."

Did Mr. Entriken indicate to you that he had had communications with those competitors?

A. Yes.

MR. MUNN: In the interest of time I object to this line of questioning on the grounds it goes beyond the scope of cross examination.

MR. GIAUQUE: I don't intend to pursue it very long, Your Honor.

THE COURT: Well, I think it probably does go beyond the scope of cross examination, sir. Is there a particular part of it you can relate to the Court and tell me that it does not go beyond the scope of cross examination?

MR. GIAUQUE: It does not, Your Honor. Counsel [Tr. 1370] asked about the competitors that were involved in the competitive process. I am trying to establish that all of those competitors are shown in the record to have been in communication with Mr. Entriken.

THE COURT: Do you have any reply to that?

MR. MUNN: On that theory, Your Honor, the whole world doesn't go beyond cross examination. Entriken's testimony was that he talked to everybody in the oil industry, and on that theory, if that lets in anything on redirect, then nothing is beyond the scope.

THE COURT: Well, I think he is probably entitled to do what he says if he keeps it within the narrow confines of what he said.

Q. Let me take an example, if I can. In Exhibit 131.10(a) received in evidence it says, "Mars, Consumers, Time, still down Thursday morning. Sinclair up, will Consumers spot self-serve 29."

Then under that it says one cent under Consumers, set a time with Time, call Jerry.

My question to you is simply, during the period of time that you made diary entries did Mr. Entriken advise you whether he had been in touch with, on future prices, all of those companies, Mars, Consumers, Time, and Sinclair?

A. Yes.

[Tr. 1371] Q Now you were asked by counsel on cross examination about a statement you made previously under oath to the effect that discussions among competitors about future prices may even help King. Do you recall that answer?

A. Yes.

Q. Now would you explain what you meant by whether King is helped or hurt by collusion to raise prices?

A. Well, when we are on the bottom 21.9 or 22.9 and we are either losing money or not making any and our volume is dried up, we are most anxious to go up. There's no question about that. But, through their efforts of establishing a normal price that we should go to, in the short run there's no question we did benefit because we were at a higher price and we picked up other volume on our way up so we were in a better position then than we were at 21.9 or 22.9.

Q. If you look at the long run, what were the effects upon your business because of the price manipulation?

A. The volume would begin to slip and we wouldn't be able to hold on to the customers we had and so we would eventually lose volume and have to reduce our prices again.

Q. You were not suggesting by your previous answer were you that King is not damaged by that activity?

A. No.

Q. Was, in fact, King damaged by the price manipulation activity?

[Tr. 1372] A. Absolutely.

Q. Counsel said in one of the questions to you that you previously testified in one of King's other Anti-Trust cases. Do you recall that?

A. Yes.

Q. How many other King Anti-Trust cases have you testified in?

A. One.

Q. How many other King Anti-Trust cases have there been?

A. None others that I'm aware of.

Q. I mean if there was one you testified in, right?

A. Yes.

Q. That suit involved the same kind of general allegations and practices, didn't it?

A. Yes.

* * * *

[Tr. 1373] Q. The question was with respect to Houston, Texas on how many occasions did Mr. Entriken tell you that he had been having price discussions with companies that competed with you down there?

A. Many times.

Q. And did Mr. Entriken convey to you information suggesting that he was rigging that market?

A. Yes.

Q. And did those activities effect King's operations in the Houston area?

A. Certainly.

Q. Did they effect them to the same, in the same nature and perhaps to the same degree as your operations in Oklahoma were effected?

A. Yes.

Q. Now, with respect to the six stations that were [Tr. 1374] planned but never opened, how did the pricing practices of Mr. Entriken and Mr. Mason and others that you testified to, how did they affect your stations to either go into or not go into those stations?

A. Well, they had a great deal to do with it. Those markets were relatively stable, and the places where we

already were marketing were just terrible so we were very interested in going into higher markets, good markets.

Q. Was your decision not to go into those six planned stations based upon the supply problem and the fact that you had been subjected to price practices?

MR. MUNN: Object to that as leading.

THE COURT: It is leading question.

Q. What factor did you take into account in making a decision not to go into those stations?

A. Well, we could not get the product in those areas and it was obvious to us the reason we couldn't was because of the pressure that had been brought to bear in other areas and it was no reason to assume that they wouldn't do the same thing in those new stations.

Q. Counsel asked whether you ever made an entry in your diary to the effect that Champlin's participation in price collusion was entered. Do you recall that?

A. Yes.

Q. The entry you have made about price reductions and [Tr. 1375] increases, were they made in the context in the period of time Mr. Entriken was teling you he was involved in collusion?

A. Yes.

Q. If you had made an entry each time that you believe that the price move was related to this collusive activity, how many times would you have made that entry?

A. Nearly every day.

* * * *

[Tr. 1379] Q. [By Mr. Munn for Champlin] Was there any reason that you knew of that those companies were not entitled to compete by meeting your price?

A. Other than the fact that they were people that Mr. Entriken talked to regularly about future prices and price fixing moves, no.

Q. Other than what he told you, you know of no reason they weren't entitled to meet your competition?

A. That is true.

* * * *

[Tr. 1381] Q. [BY MR. GIAUQUE, for King] One of the reasons, I believe you testified earlier, that you sought a price advantage was because you were the only self-service, is that true?

A. Yes.

Q. Now, so long as another oil company is selling at a profitable price do you care what they sell at so long as they make their decision independently?

A. No.

Q. What is it about the pricing of the other oil companies that you objected to?

A. Well, the agreements between them to control the market.

Q. Is it a fact that they were talking with one another about how they were going to compete?

A. Why, sure, they would determine what they would allow us to have in the way of a spot, if any. They would decide how long the price was going to be down, how long it was going to be up. Those are the sort of things that we could not live with.

* * * *

[Tr. 1391] [TESTIMONY OF CARL KING]

[By Mr. Bendinger, for King] Q. Now at the end of the Oklahoma market, did you have conversations with any representatives of any other oil companies concerning your retail prices in Oklahoma.

A. I had a call or two from Bob Phillips with Bell Oil & Gas.

Q. Anyone else?

A. I had talked to John Barbree.

Q. Anybody else that talked to you about your prices in Oklahoma?

A. I had constant conversations with Belanger, Bill Belanger.

Q. Anybody else?

A. That's all I recall. Oh, Bill Claypool with North [Tr. 1392] Western Refining Company.

Q. Let's take for a minute, Mr. King, your conversations with Mr. Belanger. Were those phone conversations?

A. Generally, yes.

Q. Do you remember when Mr. Belanger first called you on the subject of the retail price in Oklahoma?

A. As I recall it was March of 1968.

Q. At that time who was Mr. Belanger employed by?

A. Triangle Refinery.

Q. Was Triangle at that time supplying King with products?

A. I don't recall whether they were or not in Oklahoma, but they were at some terminals in Missouri, certainly.

Q. At that same time was Triangle operating retail gasoline stations in Oklahoma?

A. No.

Q. How many conversations would you say that you had with Mr. Belanger while he was employed by Triangle concerning your prices in Oklahoma?

A. Numerous. Two or three hundred.

Q. Is your recollection such that you can distinguish one of those conversations from another?

A. Well, I can recall a conversation that I had with him the latter part of 1968.

Q. During this conversation did he call you?

A. I think he did.

[Tr. 1393] Q. As best you recall what did he say to you during that conversation on the subject of your pricing in Oklahoma?

MR. MUNN: May it please the Court, we would like to make a record.

THE COURT: Come up.

(BENCH CONFERENCE)

MR. MUNN: Champlin objects to the Court permitting this witness, if you do, to testify to declarations

by Mr. Belanger or any other third party, and I would appreciate it if we could have a continued objection to all such statements.

THE COURT: All right. What's your basis?

MR. MUNN: Same basis as in the past. Hearsay.

THE COURT: Okay. Overruled. And you may have a continued objection.

MR. MUNN: Thank you.

[Tr. 1394] Q. I believe, Mr. King, you were about to tell me what Mr. Belanger said on the subject of your pricing in Oklahoma during this conversation that you recall?

A. Well, the instance I was going to tell about was when he called me, I think I was in Tulsa at the time, and wanted to meet me, and he came down to Tulsa, and I think we—he stayed overnight, I think he came in one evening and he asked me the next day, he said I got some people I want you to meet and wanted me to go have lunch with some people, which I did. And we went over, he introduced me to John Barbree, went over to his office. We went to lunch, and after lunch Belanger excused himself, so I was stuck with John Barbree. And he asked me to go for a ride with him. We drove around Tulsa and looked at a couple of his stations, and we drove by mine, it happened that I was a couple of cents, maybe one cent, I think it was two cents below—

THE COURT: Excuse me just a second, I am having difficult hearing. Can you all hear?

A. But anyhow, we drove by my stations—

Q. Wait a minute, Mr. King, until the Judge—

THE COURT: Okay, excuse me.

A. My price happened to be a couple of cents below his, I think. And he told me, he said, you know, I have distribution by DX and I got price protection and we are [Tr. 1395] not going to let you sell self-service in Tulsa. So, you just as well get your price on up with mine and we will all make some money, if you don't I am going to take it down to the bottom.

Q. Now, at the time who was Mr. Barbree employed by?

A. He owns Consumers Oil Company, I understand.

Q. And following this trip around town in the car did you raise your price?

A. No.

Q. What happened to the market?

A. Sure enough, went to the bottom.

Q. Now, back to the Belanger phone conversations, as best you recall, if you would, tell the Court and jury the substance of those conversations on the subject of your pricing in Oklahoma.

A. Well, they were, I think, they were all directed towards getting my price in Oklahoma up. And it got to be kind of a joke after a while because Belanger's superiors were asking him or instructing him to call me and I knew that, and we were also friends, but it was always the same thing. Well, the price is such and such some place, generally it was Oklahoma, sometimes it could be other areas, and they would want me to agree to a price, or agree to a future price, or maybe get my price up with what I was presently posting at.

[Tr. 1396] Q. How did you know that Belanger's superiors were asking him to call you?

A. He told me.

Q. Did he mention names during those conversations?

A. Yes.

Q. What were some of the names mentioned that you now recall?

A. Howard Barksdale, and somebody by the name of Mooney, Pritchett, and that's all I recall, there could have been others.

Q. Did Mr. Belanger in any of these conversations ever ask you to lower your price?

A. No.

Q. It was always to raise your price?

A. Yes.

Q. Did you ever agree with Mr. Belanger during any of these phone conversations that you would change your price?

A. No.

Q. During any of these conversations did Mr. Belanger ever identify companies who had been leading a price move?

A. Yes.

Q. You recall the identity of those companies as you sit here today?

A. I think he told me, I know Kerr-McGee had on occasions, would lead it in the Oklahoma area, DX, Standard, I recall [Tr. 1397] those, that's all.

Q. Did you ever suggest to Mr. Belanger that he call Sam Olson?

A. Oh, yes, I did at one time, I think.

Q. And how did that come about?

A. Well, he was getting some heat from one of our stations—when I say heat I mean he was getting a lot of calls, or some calls about a station that we had in Nowata, Oklahoma—and I told him if he wanted to find out what the problem was, if there was a problem, call Sam. And he did once, I think.

Q. Now, with regard to Mr. Claypool, you say you had telephone conversations with him on the subject of your prices in Oklahoma?

A. Yes.

Q. On how many occasions?

A. On numerous.

Q. And over what period of time?

A. I think probably it would be from early spring in 1967 up to—I don't know exactly what time, when he left Northwestern, but all the time he was there, probably '69 or '70.

Q. Incidentally, during this period of time that you had the conversations that you just described with Mr. Belanger, were your gasoline stations in Oklahoma in competition with gasoline stations operated by Kerr-McGee?

[Tr. 1398] A. Yes.

Q. Now, you say that Mr. Claypool was with Northwestern?

A. Yes.

Q. What kind of company is that?

A. They are a refiner, they are now owned by Ashton at St. Paul, Minnesota.

Q. Where were they headquartered during this period of time that you had the calls from Mr. Claypool?

A. St. Paul, Minnesota.

Q. Did you have a business relationship, then, in existence with Northwestern?

A. Yes.

Q. What relationship was that?

A. They were one of my prime suppliers for some areas.

Q. For which areas?

A. Oh, I know Missouri was one, I probably might have been buying something in Oklahoma from them at one time.

Q. Is your recollection such that you can distinguish one of your conversations with Mr. Claypool from another?

A. I recall one conversation specifically I had with him.

Q. When did that occur?

A. It was in 1968, I think, probably the summer of '68.

Q. What it a phone conversation?

A. Yes.

Q. To the best of your recollection, what did Mr. Claypool [Tr. 1399] say during that conversation?

A. Well, he told me he had a good offer for me, that Fina had decided that they would just buy me out to get me out of Oklahoma.

Q. Out of any particular market in Oklahoma?

A. All of them.

Q. Anything else about that offer that you recall at this time?

A. No, I declined the offer.

Q. Did he mention dollars?

A. No.

Q. Did he tell you why Fina wanted to buy you out?

A. Well, they didn't like my self-service pricing.

Q. Anything else about that conversation that you now recall?

A. No.

Q. With regard to the other conversations you have had with Mr. Claypool on the subject of your pricing in Oklahoma, tell us as best you can, Mr. King, the substance of those conversations.

A. Well, they were always, they were always about somebody that was dissatisfied or unhappy with my pricing structure in Oklahoma. Could have been some other markets, but I think primarily they all tended to be Oklahoma.

Q. Were these discussions with Mr. Claypool about past [Tr. 1400] or current prices?

A. Oh, they would be current, perhaps some future prices, they wanted me to go to, like that.

Q. Did you ever agree with Mr. Claypool during any of these conversations to a future price?

A. No, I think not.

[Tr. 1401] Q. But there's no doubt in your mind, is there, Mr. King, that you were asked to agree?

A. Oh, yes.

Q. Did Mr. Claypool during any of these conversations ever ask you to lower your price?

A. No.

Q. Now during this period of time, 1968 through 1973, did you have any understanding as to whether other representatives of your company were receiving calls from competitors?

A. Oh, yes, I'm sure—I know they were.

Q. How do you know this?

A. Well, Sam had told me on numerous occasions that he received calls. I knew my brother was receiving calls in the office because I was there when they'd come in.

Q. Did Sam tell you the subject of all of those calls was your retail pricing in Oklahoma?

A. Sure.

Q. Now you mentioned a little while ago you had conversations with Bob Phillips. Have you ever met Mr. Phillips personally?

A. I met him one time, I think, at a convention in Houston.

Q. Have you had phone conversations with Mr. Phillips?

A. I talked to him one time, maybe twice, when I first came in the Oklahoma market. He called me.

[Tr. 1402] Q. Did you have any discussions, any mention during any of the phone conversations with Mr. Phillips concerning your pricing here in Oklahoma?

A. Sure. That was what the call was for.

Q. Did you have any conversation with him when you met Mr. Phillips in Houston concerning your pricing in Oklahoma?

A. Yes.

Q. The best you recall, tell the Court and the Members of the Jury, if you will, what Mr. Phillips said to you when you were in Houston at this convention.

A. Well, he was very, very unhappy because I wouldn't return his calls and I hadn't for a very long time. I only talked to him once or twice before then. After that I just refused to call. He told me that we were going to have to get some cooperation from me in this Oklahoma market. I think he gave me a little lecture on the business, I couldn't make any money the way we were pricing, and I finally just walked off from him. He was very abusive.

Q. Now you say you hadn't been returning Mr. Phillips' phone calls?

A. No.

Q. Why not?

A. Well, he always wanted—what he was after was—I knew what he wanted. He wanted me to raise my prices in Oklahoma, and I didn't want to talk to him.

[Tr. 1403] Q. You say, though, you did have one or two phone conversations with Phillips?

A. Yes, when we first came into Oklahoma, late 1966 or early 1967. I can only recall one that I had.

Q. Tell the Court and members of the Jury, if you will, the substance of this phone conversation with Phillips that you do recall?

A. It was about my price in Tulsa, Oklahoma. He didn't want me to have self-service. He said they weren't going to allow it.

Q. What did you say to him?

A. Well, probably not much. I just got off the phone as soon as I could and—

Q. Did you tell Mr. Phillips that you would discontinue your self-service operation?

A. No.

* * * *

[Tr. 2278] [TESTIMONY OF GRANT CALDWELL]

Q. [By Mr. Munn] Now, we were talking about your Exhibit 223, Page 5, on which you summarized the calculations you made under the heading Predatory and Coercive Pricing Claims, and they total some $270,000, approximately, do they not?

A. Yes, sir.

Q. Now, you said you were aware of this four year limitations period from counsel?

A. Yes, sir.

Q. How much of that $270,000 relates to periods more than four years prior to the filing of this lawsuit?

A. There wasn't any precise cut off, Mr. Munn, there is just a four year period included. Of course, the complaint, I think, was filed in—

Q. October of 1975.

A. September, October, 1975.

Q. So, if you go back to October of '71, how much of your $270,000 relates to periods before October, 1971?

A. Well, there would be—that can be determined from the exhibits, but I don't know exactly what that amount would be.

Q. You have not calculated it?

A. No.

* * * *

[Tr. 2388] [TESTIMONY OF CARL KING]

Q. [By Mr. Munn, for Champlin] Mr. King, in 1973 did you file a lawsuit claiming violations of the anti-trust laws against American Petro-Fina Company?

A. Yes.

Q. Did you make the same claims against American Petro-Fina Company of Texas?

A. Yes.

Q. Did you make the same claims against Atlantic Richfield Company?

A. Yes.

Q. Did you make the same claims against Mobil Oil Corporation?

A. Yes.

Q. Did you make the same claims against Phillips Petroleum Company?

A. Yes.

Q. Did you make the same claims against Union Oil Company of California?

A. Yes.

Q. Did you make the same claims against Shell Oil Company?

A. Yes.

Q. Did you make the same claims against Skelly Oil Company?

A. Yes.

[Tr. 2389] Q. Did you make the same claims against Sun Oil Company of Pennsylvania?

A. Yes.

Q. Did you make the same claims against Gulf Oil Corporation?

A. Yes.

Q. Did you make the same claims against Husky Oil Company?

A. Yes.

Q. Did you make the same claims against Texaco?

A. Yes.

Q. Did you make the same claims against Standard Oil Company of Indiana?

A. Yes.

Q. Did you make the same claims against Amoco Oil Company?

A. Yes.

Q. Did you make the same claims against Swift and Company?

A. Yes.

Q. Did you make the same claims against Vickers Petroleum Corporation?

A. Yes.

Q. Did you make the same claims against Bell Oil and Gas Company?

A. Yes.

Q. Did you make the same claims against Coastal States Gas Corporation?

[Tr. 2390] A. Yes.

Q. Did you make the same claims against Colorado Oil and Gas Corporation?

A. Yes.

Q. Did you make the same claims against Derby Oil Company?

A. Yes.

Q. Did you make the same claims against Triangle Refinery?

A. Yes.

Q. Did you make the same claims against Kerr-McGee Corporation?

A. Yes.

Q. Did you make the same claims against Farmland Industries?

A. Yes.

Q. Did you make the same claims against Midland Cooperative?

A. Yes.

Q. With respect to your Admiral Place Station in Tulsa, have you made a claim for damages to that station?

A. I would think so.

Q. I'm sorry, I hadn't finished my question. With respect to your Admiral Place station in Tulsa, have you made a claim for damages against other companies in another lawsuit?

A. No, I don't think so.

* * * *

Q. Do you recall this testimony which appears at [Tr. 2393] Page 620 of that deposition?

Question: "You have identified a station at 5307 East Admiral, Tulsa, Okiahoma?"

Answer: "Yes."

Question: "Is that open or closed?"

Answer: "It's open."

Question: "Do you own that station or lease it?"

Answer: "It is leased."

Question: "How long have you operated that station?"

Answer: "I dont' recall, it's been a number of years."

Question: "What is your damage claim based on with respect to that station?"

Answer: "Predatory pricing, lack of product."

You recall giving that testimony in the Nebraska case?

A. Yes, I believe, I don't recall the exact words, but something to that effect, yes.

• • • •

[Tr. 2428] Q. Did anyone advise you that you could sell lower than anyone else in the market?

A. On the contrary, they advised me I couldn't.

• • • •

[Tr. 2769] [IN CHAMBERS, MR. MUNN SPEAKING FOR CHAMPLIN]

Now, the next one is, Mr. Jeff Smyth. Mr. Smyth is a Champlin employee. Contrary to Mr. Glauque's assumptions, he is not being asked to give opinions. He has simply made mechanical calculations, and I think at this point the best thing to do is to go to specifics. Mr. Smyth's first exhibit that he will refer to is Defendant's Exhibit 19. All that this does is mechanically break out the amount of damages in the Caldwell study attributable to alleged sales below his desired level and the amount above, and the amount for the statute of limitations period. And the amount after.

Mr. Caldwell said he didn't have that information when I questioned him about it, but he said anybody could compute it from the exhibit. It's strictly a mechanical [Tr. 2770] calculation that anyone with a knowledge of mathematics can do. Mr. Smyth utilized a computer to do it rather than doing it mechanically because it was faster and more expeditious. But the exhibit is not a critique of Mr. Caldwell's calculations. It's simply a segregation of them into two separate divisions. I think a Champlin employee is—ought to be permitted to do that. I think the Jury is entitled to know what is and is not barred by limitations. And I think they are entitled to know how much of these alleged

damages result from sales below the optimum level selected by Mr. King and how much above.

THE COURT: You want to get in the Statute of Limitations business again with him, is that right?

MR. MUNN: Sir?

THE COURT: You want to get into the Statute of Limitations again?

MR. MUNN: That's the reason for one of the two subdivisions on Defendant's Exhibit 19, yes, is simply to say how much of those damages are attributable to the period prior to October 1, 1971.

THE COURT: That issue of Statute of Limitations, we have taken care of it, haven't we?

MR. MUNN: Have we? How?

THE COURT: Haven't we?

MR. MUNN: I don't know. Have we? How have [Tr. 2771] we taken care of it? I'm asking for information.

MR. GIAUQUE: I would ask, Your Honor—

MR. MUNN: Wait a minute. May I finish my argument to the Court and then you can go later.

I'm trying to find out what you're saying to me. I don't know what you're saying when you say—

THE COURT: Who's in charge here?

MR. MUNN: You are.

THE COURT: If you will let me say who talks rather than you say.

MR. MUNN: Excuse me. I should have. Yes.

THE COURT: Yes. Thank you.

Yes, sir.

MR. GIAUQUE: We would only note that when the Motion to Exclude the Caldwell Exhibit was made that the Statute of Limitations was not one of the grounds for excluding it. The damage study covers the period from January 1, of '70, because of the fraudulent concealment argument of the Plaintiffs, through the Fall of 1975, and that was simply not one of the grounds reserved on either the Motion to Exclude the Caldwell

Exhibits nor the Motion for a Directed Verdict, and we deem the matter to have been waived at that point.

MR. MUNN: May I respond?

THE COURT: Yes.

[Tr. 2772] MR. MUNN: Well, the answer I'm not talking about excluding the Caldwell exhibit. I don't think the fact an exhibit is in Evidence means that the Statute of Limitations is written out of the case. And so, Defendant's Exhibit 19, as I was saying, simply shows the portion of the damages which are attributable to a period that we contend is barred by limitations.

• • • •

[Tr. 2830] THE COURT: Objection sustained as to 19 and 24.

MR. MUNN: All right, sir.

THE COURT: Into evidence, and any evidence with it.

MR. MUNN: I want to make my offer of proof.

THE COURT: All right, sir.

MR. MUNN: The defendant offers Defendant's Exhibit 19 and Defendant's Exhibit 24, which is the back-up for it. And if we had been permitted to do so by the Court, would have had Mr. Jeff A. Smyth testify that Defendant's Exhibit Number 19 is a mathematical computation based upon Defendant's Exhibit 24, and that Defendant's Exhibit 19 shows two things.

THE COURT: I want to say this. At the top, before you say that, that it does say Caldwell Calculations.

MR. MUNN: I understand.

THE COURT: All right.

MR. MUNN: It says King Gas & Oil, too. But, that is for identification of who we are talking about.

I started to say if permitted Mr. Smyth would testify that Defendant's Exhibit 19 shows two things.

First it shows that of the $271,744 claim included in the Caldwell calculations under the heading Predatory and [Tr. 2831] Coercive Pricing Claims, some $166,231 was applicable to the period October 1, 1971, and fol-

lowing. And some $105,513 was applicable to the period prior to October 1, 1971. That being the approximate beginning of the limitations.

Second, he would testify that it shows as a mathematical calculation that of the $271,744 claim, 84 percent, or $228,954 is attributable to sales below the desired level established or testified to by Mr. King. Sixteen percent, or $42,790 is applicable to sales above the so-called desired level. That covers it.

THE COURT: All right, sir, thank you. Any record you want to make?

MR. GIAUQUE: I would only note for the record that the Caldwell damage exhibit covered a period of from January 1, 1970, through 1975. There was no objection made to the introduction and receipt of those exhibits on the grounds that they exceeded the statute of limitations.

THE COURT: Mr. Zarbono?

MR. ZARBONO: No further record.

MR. MUNN: I think we made a record on it.

• • • •

[Tr. 3379] MR. WALKER: Yes, I would like to be heard, I didn't know whether Mr. Hill had any motions to submit on behalf of the third party Plaintiff.

THE COURT: Do you have any motion?

MR. WALKER [sic: Hill, for Champlin]: Yes, Your Honor, I do. I would resubmit out motion for a directed verdict. I don't think an argument would be necessary, but the reasons and grounds were stated back on May 5, at the close of Plaintiff's case; we would reurge those same grounds; in addition we [Tr. 3380] would urge a portion if not the substantial majority of Plaintiff's claims are barred by the applicable statutes of limitations.

THE COURT: Thank you, Mr. Hill.

• • • •

[Tr. 3399] THE COURT: "In considering the motion for a directed verdict the trial court should view the evidence in the light most favorable to the party against whom the motion is made.

A directed verdict is proper only where the evidence and all the inferences to be drawn therefrom are so patent that minds of reasonable persons could not differ as to the conclusions to be drawn therefrom."

The motions submitted by the various parties for directed verdicts are overruled.

• • • •

[Tr. 3400] THE COURT [in Chambers]: All lawyers here?

Plaintiff.

MR. BENDINGER: Your Honor, there is a housekeeping matter that we would like to take care of first thing this morning. As the Court knows, Champlin earlier on in this case filed a defense of statute of limitations. And in our complaint we originally alleged a fraudulent concealment, which would have tolled the statute of limitations. We put in damage evidence for the period 1970 through '75, and we have introduced evidence throughout the course of the trial bearing on the issue of fraudulent concealment, and that evidence and the state of the record now is such that I think is uncontroverted that the fraudulent concealment has been established in this case. Champlin hasn't put on any evidence at all as to their statute of limitations defense. And I think while the Court has previously indicated in chambers and otherwise that it really wasn't an issue, in the instructions—

THE COURT: That what wasn't an issue?

MR. BENDINGER: It was no longer an issue.

THE COURT: You said that a ruling was no longer an issue.

[Tr. 3401] MR. BENDINGER: No. That the fraudulent concealment wasn't really an issue any more and the jury instructions that the Court is going to read to

the jury today, as I understand it, have the damage period 1970 through '75, which I think—

THE COURT: That they do.

MR. BENDINGER: Which I think implicitly goes to the fraudulent concealment issue, but there has been no formal ruling on the record, and I think for purposes of this case that we ought to—we ask the Court to formally rule now and that we have satisfied our burden. They haven't produced any evidence whatsoever to controvert the evidence in the record of the concealment of the distribution of records, so we would ask for the Court's ruling.

[Tr. 3402] THE COURT: Mr. Munn.

MR. MUNN: I think it would be error to so rule.

THE COURT: Why?

MR. MUNN: You would in effect be taking fact questions away from the Jury. You would be overruling Judge Morris' published opinion in this case as to what does and does not constitute fraudulent concealment, and that's our position.

THE COURT: And that was as to Third and Fourth Party—

MR. MUNN: The law is the same regardless of what party the rule is applied for or against. Yes.

MR. BENDINGER: Well, I don't think Judge Morris' opinion, Your Honor, addressed the issue in the context it's now being put before the Court. In that case, it was just merely a matter of whether we are—our complaint—the Amended Complaint related back to the original filing date and whether or not Mason and Bowles should be allowed to be brought into this case; and the issue there was we—the Judge said, in fact, when we took Entriken's statement we were at least on notice then and we could have brought Bowles and Mason in; it wasn't merely a mistake on our part, but we made a tactical decision not to name them when we filed the lawsuit against Champlin. That was the basis for the Court's ruling in that case. It had nothing [Tr. 3403] to

do with whether or not the evidence that's come in in this case is sufficient to establish fraudulent concealment. It's in an entirely different context.

THE COURT: What ruling is it you want of the Court? That what?

MR. BENDINGER: That we have sustained our burden of showing fraudulent concealment or, in addition, that they have waived their statute of limitation defense.

I neglected to mention that earlier, but I do think that they have waived it because when the Caldwell damage exhibits were introduced, offered to the Court as Evidence, Mr. Munn made a long argument against their introduction and went through some six or eight or nine objections to those exhibits; and that one of the objections was based on statute of limitation ground, and it seems to me in the normal course, if Champlin objected to the damage period or the damage evidence, then they would have filed a motion to strike portions of the damage—damage exhibits as being outside the statute of limitation; or they at least would have noted for the record that there was a statute of limitations problem. They didn't. I don't think they have reserved at this point any limitations defense.

The context it comes up in, Your Honor, I think, is under the Instructions and under the records that currently exist. It's proper for the Jury, I think, to consider our [Tr. 3404] damage evidence from January 1, 1970 through—

THE COURT: 1975.

MR. BENDINGER: —through 1975. And I understand what Mr. Munn's position is, and I wouldn't be surprised that if during argument he stands up and said they could only consider four years without a ruling from the Court.

THE COURT: It's not an issue in controversy, the Court shall rule that the Plaintiff has sustained its burden.

MR. MUNN: You are ruling that the statute of limitation is not an issue in controversy in the case?

THE COURT: That is right.

MR. MUNN: We except to the ruling.

THE COURT: Plaintiff has sustained their burden as to fraudulent concealment.

• • • •

[Tr. 3448] [Mr. Munn speaking for Champlin]

Champlin first objects to the charge in that it fails to include any instruction on the statute of limitations.

• • • •

Champlin further objects to the statement of the case wherein the dates, January 1, 1970, through October 2, 1975, are shown to be the applicable time period in this suit since same ignores the application of the statute of limitations.

• • • •

[Tr. 3450] Champlin further objects to that portion of the charge relating to the damage to the plaintiffs in that it includes the dates January 1, 1970, through October 2, 1975, for the reasons stated before.

• • • •

[Tr. 3454] [Closing Argumentof Mr. Giauque for King]

Now why did we do that? How does a case like this get into the Federal Court in Muskogee? King knew some time ago, first-hand knowledge, after Mr. Entriken advised Mr. Olson of his activities at Champlin and that he had records in support of those activities, King knew first-hand about the price-fixing conspiracy because it learned when it discussed the matter with Entriken in 1975. King also knew that it had been a target for a long time of the price manipulations and it knew that first-hand because it had received, as we well know, numerous, numerous calls over a period of three-and-a-half to four years about what was going in the Kanasas area and finally down in Texas and Oklahoma. And it knew that while King is a relatively small company, it was

definitely doing something that was getting the attention of larger better-financed companies.

• • • •

[Tr. 3461] • • • Apparently his [King's] method of marketing was reasonably successful because, as you know, he did get the attention of Champlin, and Consumers, and Bell, and a number of other companies. Early on in the period he received calls from Mr. Tush at Champlin. Mr. Tush would tell them what the timetable was on future market moves, clear price-fixing. They got calls from Mr. Stringer, Mr. Sylvester, and Mr. Griggs at APCO where they were told over and over what their price should be. Your price should be 32.9, your price cannot be 29.9. They had calls from Phillips, and right to the effect that Oklahoma is our territory, you can't come in here and price on that Kansas self-serve basis. And Phillips was counseling with them. Counseling with them. That is a nifty way of saying I am tampering with the price. What business is it of Mr. Phillips to counsel King about what price he sells at. Is he God, does he have infinite wisdom? No, it is a common price-fixing activity Mr. Phillips was in no matter how you cut it. He counseled with King, he counseled with Olson, he counseled with various people around this market. He reminded them of the economics of their operation, if they priced here versus the economics if they price somewhere else where he suggested they price. He didn't threaten them, he [Tr. 3462] merely counseled them. Well, they counseled with King a couple of years before King came in here and they counseled after. And Mr. King proudly, Mr. Fred King, told them you fellows go ahead and do your damnedest. When they were threatened about coming in here King told them do your damnedest, try to take us out.

Belanger testified that he had calls while he was with another company. He had calls from the same big five. Pritchett, Mooney over at Kerr-McGee, Stringer, some of these other fellows that Mason and Entriken talked

constantly with, and Mr. Entriken identified them as the five, the big five they talked with. Is it only coincidence that Mr. Belanger was called by these same people to call and try to exert a little influence to counsel with King about its prices? No, it's not coincidence. The fact of the matter is that these same big five were involved with hard-core price-fixing from 1967 through 1973 at least. How you can draw any other inference about what Mr. Mack Wright does, or Mr. Bob Phillips, or Glen Stringer, other than the fact they spent full time rigging markets, tampering with the prices, interfering in combination with others with the normal pricing system. That is their job. That was Entriken's job. He was hired to do the same thing. Carl King testified that they put it to him a little more bluntly, [Tr. 3463] a little more directly. When he came into the Oklahoma market, once arrangements had been made for a luncheon and they had a little polite chit-chat during the luncheon, Mr. John Barbree, arranged by Mack Wright at Consumers, drove him around town and looked at the price signs and Barbree told him they weren't happy with the prices being posted, told him he better get them up or they would drive him out of here. These are the same kinds of calls about your supply, about your prices, and everything that King had been receiving for three years.

Then Sam Olson was made supervisor in this area and he said that he had calls from these competitors about King's pricing before Mr. Entriken ever entered the picture. That Mack Wright called him when he was up in Kansas to complain about King's Oklahoma prices. And Olson said he thought it was curious at that time when Wright told him what was going to happen in the market and he checked and it was happening. It did happen. Remember the Court's instruction, conspiracy is to be judged by the acts what happened. He would go out and check the market. Mr. Wright is a soothsayer, did he have a crystal ball about what was going on in the market? No, he had a telephone line. He was

colluding at that time and he was telling the King folks what was going to happen and it was happening.
[Tr. 3464] Mr. Wright told Olson if they wouldn't raise, Fina would buy them out and if they couldn't be bought out they would be run out. Olson relayed that to Carl and Fred King at the time, caused them some concern because they had already made a commitment to come down here to Oklahoma to market. Then when they got down here they got a call from a broker named West from Oklahoma City who represented a number of oil companies. [Tr. 3465] And he told them they had better go along on normal pricing, or if not products might be kind of hard for them to get a hold of.

Well, we don't have to talk about threats in the sense that somebody's going to bring a gun and gun you down. That is a threat. It is a none too thinly veiled threat. You better play ball in this market or you won't be in the game.

Olson testified he had early conversations also with Wright and Phillips about the Oklahoma pricing. That Mack Wright told Sam Olson where King was suppose to be. They told him, we have a good market here. We recommend you price with the profit brand full service sell. We are not going to let you take a spot by your self service operation. Sam said he wouldn't agree. Wright said you're pricing isn't going to work. Phillips then said you can't continue in this matter if you do, you'll find yourself in short supply in this market.

Olson said he heard from Wright and Phillips three or four times a month, always to the same effect, always seeking to get King to go along, raise his prices, and tell him there was a future move, they wanted their cooperation.

Then in June of 1970 Mr. Entriken enters the picture. You'll recall how Olson met Entriken. Entriken called, said I'm the new pricing man of Champlin. You've had a problem [Tr. 3466] with a Sears station down the corner. I want you to know I've taken care of that.

They are going to go back up. I'd like to tell them that you agreed to go back up. Olson said, if you will recall, Mr. Entriken, we'll get along fine if you don't ask me those kind of questions again.

What happened? He went out and looked and the Sears price was up. The problem had been solved. Mr. Entriken was doing his job.

* * * *

[Tr. 3474] * * * You remember Olson said they would stay there a few days and their volume would dwindle because they didn't have the services offered by the full service stations. When the volume fell off they would go to 29.9 to try to capture the volume. That is, when all the threats, the three and a half years of phone calls came into play, because they had been told they couldn't take a spot like that even though probably cost justified, passing it on to the consumer. If King was told if it didn't price at full normal it would have to price way down because they would take it down, they would meet King on the nose, and it happened over, and over, and over, restoration to full normal, King 32.9, volume falls off. Twenty-nine nine in a desparate attempt to get some volume. Hudson, Champlin, Derby, Fina, APCO, the majors, even, would come down and meet them at 29.9 forcing King to go down to try to get volume at a lower price on down to the bottom. That was the phenomenon that went on and on. Entriken said they knew that, they discussed it in the office.

* * * *

[Tr. 3476] When King came into the market they [competitors] were immediately unhappy and they told Entriken, as he testified, that if King continued to try to take a spot they would drive the price to the bottom and they would sit on it. Olson corroborated the fact that he received those calls and that the acts in furtherance of the conspiracy occurred again because they did it. Entriken testified that within the Champlin office

they knew and discussed that if the independent spot was eliminated the independent got no business, and said that he and Mack Wright discussed the fact that Consumers, that King had got Consumers' attention and Consumers had decided to eliminate the spot and meet King penny for penny all the way to the bottom. And you recall Olson testified that is exactly what happened. They kept it down in Oklahoma City at every one of the stations for a period of two weeks. Well, imagine if you and your husband was a service station operator and your cost is 22.9, and they move it to 21.9 or even 22.9 for two weeks and every gallon you sell you are losing money. How many people can afford to stay in business? Now, if that isn't predatory pricing, then, there is no such thing. These were matters that Champlin personally discussed openly with other competitors. The fact that this was a good practice to get involved in because it would get the attention of the independents. [Tr. 3477] And you recall Olson said that he asked Entriken why Consumers was doing this to them. Entriken called Mack Wright at Consumers and told him if King wants the price up in Oklahoma City then why is their pricing so low in Tulsa. In other words, if you don't want us driving the price down on you, you better get them up somewhere else. Constantly, constantly pursuing the rigged market. Constantly trying in combination with one another to interfere with King's right to set its own price and conduct its business freely.

Entriken testified that he worked on various matters simultaneously. That while he would be trying to move one market, he would talk about other markets as well. You remember Entriken testifying that not only was he involved in price-fixing, but there was no doubt that Mr. Mason knew full well what he was doing. There was no doubt in his mind that Mr. Mason was involved in the same activities because he overheard those conversations. He heard the instructions from Mason. Mason's original instructions were to find out what the

problems are, see what you can do to get the supports up. Entriken said he even heard the other end of the Mason-Olson call about the Sand Springs Road. Everybody has testified on that. Olson testified Mason called me and said I have been working my tail off to get all these stations up on Sand Springs Line, [Tr. 3478] you better go along, be at 32.9 by five today. And when Olson balked he told him he had better do it or he would call all those stations and get the prices right back to the bottom and he would leave them there. Whereupon Olson told him to go to hell. The prices went down and they stayed down at all those stations for ten days or two weeks. Mason said he doesn't recall the conversation. He is sure he didn't threaten anybody, but he doesn't recall the conversation. Entriken said in the office that day he recalls that Dewey Mason said King is a problem. I got the whole market up and he won't move. And then Mr. Mason got mad at the end of his conversation with Olson. The testimony is uncontroverted King was the renegade marketer who would not agree to raise price. And even though King wouldn't agree to raise price even though there were numerous conversations between Olson and Entriken, Entriken testified that he never made threats to King or anybody else. I don't think we need to spend a lot of time as to what a definition of a threat is. The fact is, all you have to do is suggest something that causes concern or intimidates a party about a source of supply or his continued viability in business.

Now, Entriken came in here, ladies, and he named all the persons that he directly and in person rigged [Tr. 3479] prices with. He named Wright and Barbree of Consumers, Roger Hines, Glen Stringer, Hines of Conoco, Stringer of APCO, Parker with Fina, Mooney and Pritchett and Sawyer with Kerr-McGee, he said he had frequent conversations with them, that they agreed on prices, that they moved markets. Told the details, when, where, why, who, how. You see any of them get on the stand? Did you see any of the big five, except

Mr. Phillips who came here and testified really in support of plaintiffs' claim, you see any of the big five get on the stand and deny that they met with Entriken? That they had phone conversations? They are outsiders of this lawsuit, they are not going to become involved, they are not going to be anybody's patsy. The fact is they weren't produced, the inference would be on their nonappearance here, their failure to come and deny, would indicate if called their testimony would have supported plaintiffs' claim. Not a single one of those key co-conspirators named showed up in this courtroom.

* * * *

[Tr. 3484] Well, no, Entriken's testimony in this case does not stand by itself. Entriken's testimony was cooperated [sic] by Sam Olson, by Mr. Alves, by the two girls in the office, by Mr. Osment, another independent competitor out in the market place. Olson admitted that he talked with Dea over a hundred times during the period. He said his information from Dea was very accurate. That Dea told him in advance of virtually every price move in the Oklahoma market. Olson had no doubt looking back on the records and knowing what he was telling him that Dea was involved heavily into price fixing. He said Entriken even discussed with him the fact that competitors didn't like King selling at 29.9, that they knew that it was an optimum price. They may not [Tr. 3485] have used that term. They knew it was a price at which King would get some volume and they kept him from pricing it at that level. Entriken told Olson about his discussions with the big five, Stringer and Grimes and Hines and Phillips, and he told him repeatedly that those other companies had agreed what market was moving and when it was moving. Olson testified that he had cause [sic] from Wright and Phillips about supplies. That Phillips continued to count on him on behalf of King as to where King should price. Olson testified as I've indicated about the conversation directly with Dewey Mason about price fixing on the Sands

Springs Road. He testified that goes [sic] prices remained down for at least two weeks. He said that the business of being told by Mason and Entriken and Mack Wright and all these others, you either agree to go up or we'll drive you to the bottom, occurred over and over and over. Usually involved Consumer's, or Champlin, one or the other or both. He said, King was forced to deal with the companies one at a time and that the prices that these competitors were talking about forced King to take low margins or no margins wherever they drove it to the bottom. Olson testified about Harbors predatory price, the effect that after Harbor came in there were no differentials allowed. That Champlin's private brand Harbor Stations met them on the nose. And that he had a conversation with Entriken where Entriken told [Tr. 3486] him that Champlin was going to market on the penny with King. Was going to do that for the same reason that Ride had done it with independent in Muskogee, and that was to get their attention, to discipline them, to get them back up where the other marketers wanted them to be.

* * * *

[Tr. 3577] A couple of quick points in response to counsel's remarks. King's other anti-trust lawsuits, as if he has dozens of them. Stay with the evidence. The evidence is he had one other lawsuit of an anti-trust nature and it was the Bonus suit in Nebraska. Mr. King got on the stand himself and testified that he made no recovery whatever in that lawsuit for any of the injuries or damages sustained by any of his stations in Oklahoma, Texas, or Arkansas. Counsel would have you believe that Mr. King was litigously filing all kinds of these things. As I said before, if you have this kind of evidence and somebody has hurt you, devastated your business, you are foolish if you don't stand up for your rights.

* * * *

[Tr. 3581] * * * Isn't it a curious thing that the majors and branded independents all come down right to the 29.9 if a self-service tries a price cut? They don't want him to have that price. And that happened over and over. And I want you to try to understand. Place yourself in the position again of the small service operator. See how this pricing phenomena they involved themselves in will strangle a company like King. They say, well, we'll let you price at a level where you can't hurt us, 32.9, where you don't get much volume, but if you don't keep the price where we tell you then we'll drive it to the bottom where we can hurt you and hurt you badly.

Olson testified that not only had they made some plans to open these stations, but that the price coordination efforts of all these companies and the fact they were riding the prices up and down in a hallucinative manner, that price could materially effect their decision whether they were going to open those stations and materially effected their decisions about closing some of the stations they had. * * *

* * * *

APPENDIX I

PRAY, WALKER, JACKMAN,
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A PROFESSIONAL CORPORATION
Attorneys at Law
2200 Fourth National Building

Tulsa, Oklahoma 74119

August 12, 1981

Charles C. Baker, Esq.
Gable, Gotwals, Rubin, Fox,
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RE: Entriken vs. Champlin Petroleum Company, et al.
Case No. CT-80-659, District Court of Tulsa County

Dear Chuck:

We received notice this morning that Judge Beasley has set this case for pre-trial on October 2, at 2:40 o'clock p.m. It is our intention to ask the court for an early trial date. Plaintiff does not intend to take any depositions in this case, but will rely upon and use the deposition and trial transcripts from the *King & King v. Champlin* litigation. The facts and circumstances are fully disclosed in those transcripts and there is nothing left to be discovered. In addition to Dea Entriken, we will call Hon. Frank C. Seay, Richard W. Giauque an Gary F. Bendinger as witnesses for Plaintiff. Giauque and Bendinger are the Salt Lake City lawyers who represented King & King in the anti-trust litigation. Judge Seay was the judge in the prior suit. Each have [sic] been contacted and have [sic] consented to testify for Plaintiff in the malicious prosecution case.

We view the Tenth Circuit's August 3rd opinion in the anti-trust case as precluding the issue that Champlin engaged in a price fixing conspiracy and that Entriken and Dewey Mason's activities in furtherance of that conspiracy was [sic] performed within the course and scope of their employment and was [sic] performed at the specific insistance of their superiors, William Biggersmith, Kenneth Richardson and Micki Bowles. We will be preparing and filing an appropriate document for such issue preclusion prior to the scheduled pre-trial conference.

I am sending copies of this letter to Dale McDaniel and Deryl Gotcher with the suggestion that if any of your respective clients have any interest in settling this case, would you please let me know and I will discuss it with my client and give you some settlement figures.

Very truly yours,

PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR

/s/ Floyd L. Walker
FLOYD L. WALKER

FLW:lkf

cc: Dale F. McDaniel, Esq.
Deryl Gotcher

Opposition

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No. 81-929

In the Supreme Court of the United States

October Term, 1981

CHAMPLIN PETROLEUM COMPANY,

Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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November, 1981

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No. 81-929

In the Supreme Court of the United States

October Term, 1981

CHAMPLIN PETROLEUM COMPANY,
Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

Respondents King & King Enterprises, d/b/a King Gas & Oil, and Carl R. King, d/b/a King Gas & Oil (hereinafter referred to as "King")[1] respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by Champlin Petroleum Company

[1] Impact Stores, Inc. is an affiliate of King & King Enterprises, Inc. and is identified in accordance with Rule 28, Rules of the Supreme Court of the United States.

(hereinafter referred to as "Champlin") seeking review of the *unanimous* decision of the United States Court of Appeals for the Tenth Circuit, affirming in part and reversing in part a judgment of the United States District Court for the Eastern District of Oklahoma entered upon a jury verdict based upon massive and overwhelming evidence that Champlin had combined and conspired with its co-conspirators to fix retail gasoline prices in the States of Oklahoma, Arkansas and Texas in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

Champlin did not contest on appeal the jury's determination that Champlin had engaged in price fixing activities and does not challenge the Court of Appeals' affirmance of the jury's verdict in that regard in its Petition for Writ of Certiorari. Rather, Champlin asks this Court to review the judgment of the district court and of the Court of Appeals that the evidence established as a matter of law that Champlin had fraudulently concealed its price fixing activities. Champlin urges this Court to review the propriety of the trial court's decision not to submit the issue of fraudulent concealment to the jury, notwithstanding the fact that the unanimous decision of the Court of Appeals affirming the trial court's decision, does not conflict with any decision of other federal courts of appeals or with any decision of this Court, does not represent a fundamental departure from the usual course of proceedings and was in fact fully supported by the record. Champlin's Petition does not present any question of federal significance.

OPINIONS BELOW

The August 3, 1981 opinion of the United States Court of Appeals for the Tenth Circuit is reported at 657 F.2d 1147 (10th Cir. 1981) and appears in Appendix A hereto at pages A-1 through A-47. The September 14, 1981 Order of the United States Court of Appeals for the Tenth Circuit denying Champlin's Petition for rehearing and suggestion for rehearing *in banc* appears as Appendix B hereto. On October 15, 1981, the Court of Appeals entered an Order recalling and amending the mandate to allow interest on the reduced judgment at the rate of 12% and on the lower court's judgment for attorney's fees; a copy of the Order appears as Appendix C hereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly affirmed the trial court's holding that the evidence established as a matter of law that Champlin had fraudulently concealed its hard core price fixing activities, when the appellate court expressly held (a) the evidence overwhelmingly supported the proposition that all price fixing activity was concealed by Champlin and (b) that there was "not one bit" of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy was not fraudulently concealed.

2. Whether Champlin was deprived of its right to trial by jury when both the District Court and the Court

of Appeals found that there was nothing in the record upon which any reasonable juror could base a finding that the price fixing conspiracy was not fraudulently concealed.

3. Whether Champlin is estopped by its trial conduct, wherein it categorically denied the existence of any price fixing conspiracy and totally failed to present any statute of limitations defense, from now claiming for the purpose of seeking review in this Court that its admittedly hard core price fixing activities were not fraudulently concealed and that the issue of fraudulent concealment should have been submitted to the jury.

4. Whether the Court of Appeals correctly allowed interest on the judgment of the District Court awarding King attorney's fees under 28 U.S.C. § 1961, which provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court".

STATEMENT OF CASE

1. *The Price Fixing Conspiracy.*

This proceeding concerns hard core price fixing by Champlin and its co-conspirators in violation of Section 1 of the Sherman Act. Champlin's price fixing activities were testified to at length during the 18 days of trial by Dea Entriken, a former employee of Champlin and *an admitted price fixer*. As Entriken and others testified, those price fixing activities were designed and effectuated for the purpose of eliminating the disruptive pricing of King and other price cutters and stabilizing markets so that Champlin and its co-conspirators could maximize their profits.

The testimony of Entriken was corroborated by the testimony of employees of the named, as well as the unnamed, co-conspirators, and the testimony of Dewey Mason, Entriken's superior while he was at Champlin, and by hundreds of documents which were maintained by Entriken in the ordinary course of his employment ... Champlin.

The following substantial evidence overwhelmingly established Champlin's price fixing.

1. Entriken, Robert Alves (a former Shamrock jobber) and Jim Ozment (a competitor of King's) each *admitted price fixing*.

2. Becky Rhoads and Gail Campbell, Champlin's pricing clerks, both testified that Entriken and Dewey Mason were involved in price fixing.

3. There was a constant and reciprocal exchange of information between Mason, Entriken, Bob Phillips (formerly President of Vickers Petroleum Corporation) and others for the *purpose* of stabilizing the market and obtaining commitments on future price moves. *Entriken and Mason had approximately 800-1200 conversations per month with competitors seeking commitments on future price moves when Champlin's office was on Charles Page Boulevard in Tulsa, and Entriken had approximately 5,000 phone conversations with competitors in the ten months after Champlin's office was moved to Yale Avenue. Entriken spent 90% of his time seeking commitments from competitors on future price moves when markets were subnormal.*

4. The exchange of market information had the *effect* of stabilizing the market.

5. Champlin and its co-conspirators talked about who was *causing* the *pricing problem*, and then *counseled* that company about the *economics* of its pricing to get that company to change its price.

6. Information obtained during the counseling sessions and other market information was passed on from one competitor to another until "*all were committed*" or until "*all were in line.*"

7. Entriken kept detailed records which reflect *over 100 specific examples of Champlin's price fixing agreements.* Those documents state unequivocally that certain companies "*will go*" to a specified price or that "*all are committed.*"

8. Mason prepared a "Talk/No Talk" document to identify for Entriken those companies with which he could *continue* discussing future price moves.

9. Mason gave Entriken a note indicating it was "okay MLB" to talk to Bob Parker (a Fina jobber and a competitor of Champlin). Thereafter, Entriken talked to Parker about future price commitments and Parker joined the conspiracy by supporting the collusive market restoration efforts.

10. There was price uniformity among Champlin and its competitors when prices were being driven to the bottom and there was price uniformity among those companies when the markets were restored.

2. ***Champlin's Price Fixing Activities Were Fraudulently Concealed.***

The district court ruled that Champlin's price fixing activities had been fraudulently concealed as a matter of law. On appeal, the Court of Appeals painstakingly weighed the facts and affirmed the trial court's ruling. The following uncontroverted evidence overwhelmingly established that Champlin's price fixing activities were fraudulently concealed from King as a matter of law. (Examples of the relevant testimony are contained in Appendix D hereto).

1. Mason prepared a "Talk/No Talk" document. PX5 (App. D at 55).

2. Entriken testified that the purpose of the "Talk/No Talk" document was to distinguish people who would hold Entriken's price fixing conversations in confidence from others who may not be as discreet or reliable. (App. D at 56-67).

3. Entriken often made his price fixing telephone calls after normal working hours. (App. D at 65, 68-71).

4. Mason's action plan for 1973 advised that Entriken should "avoid any legal entanglement as much as possible." (App. D at 72-77).

5. Mason warned Entriken that he was going to get everybody "behind bars" and that he should get rid of his records if anyone began asking questions. (App. D at 78).

6. Entriken testified that Champlin's price fixing activities "were undercover things." (App. D at 79-82).

7. Mason kept notes reflecting his conversations with Champlin's co-conspirators, but they were destroyed. (App. D at 83-86).

8. Mason threw away his telephone directory in 1973 when Entriken was terminated. (App. D at 87).

9. Champlin had a special phone system which showed a special billing number for each call but no one knows what happened to any of the telephone records for the period 1970 to 1973. (App. D at 88-96).

10. In 1973 when Entriken was terminated, he went to see an attorney for Champlin, and disclosed in substance, Champlin's price fixing activities. The attorney told Entriken to forget it and "put it all behind you." (App. D at 97-100).

11. After Entriken disclosed the existence of Champlin's price fixing activities in 1975, Champlin sued him in a further effort to keep the truth from surfacing.

Champlin did not offer one scintilla of evidence that its price fixing conspiracy was not fraudulently concealed.

In addition, the following uncontroverted, substantial evidence demonstrates that King did not know prior to 1975 that there was a price fixing conspiracy and that King was its target.

1. Fred King and William Belanger, King employees, both testified that they personally had not known that Champlin was involved in the price fixing conspiracy. (App. D at 101-103).

2. Sam Olson, a former employee of King, testified that he did not contact Entriken until 1975 when he visited Dallas to look at possible sites for service stations. (App. D at 104-106).

3. Olson then asked if Entriken would tell him about what had happened at Champlin, and when Entriken told him, Olson's response was "Really, did that happen?" (App. D at 106-111).

4. Entriken had not talked to anyone about the price fixing conspiracy or disclosed any of his records from the time he told a Champlin attorney in 1973 until the time he talked with Olson in 1975. (App. D at 79, 97, 112, 113).

5. The Champlin attorney that Entriken contacted did not tell King about Champlin's price fixing activities.

All of the above "*in house*" evidence of Champlin was discovered and could *only* have been discovered *after* Olson's meeting with Entriken in 1975, and fully supports the Court of Appeals' affirmance of the district court's ruling that King did not know and could not have learned of the price fixing conspiracy by the exercise of due diligence. The bits and pieces of testimony selectively cited by Champlin out of context do not warrant a different conclusion.

3. *The Opinion Of The Court Of Appeals.*

Champlin appealed from the district court's judgment, claiming the lower court judgment should be reversed because (1) the district court judge treated

Champlin unfairly, (2) the evidence was insufficient to support the damage award, (3) the issue of fraudulent concealment should have been submitted to the jury, and (4) the trial court judge committed error by its "massive" exclusion of evidence proffered by Champlin. *Champlin did not appeal the jury's determination that it engaged in price fixing.* The Court of Appeals, in a carefully written opinion which demonstrates a thorough familiarity with the entire record, found the evidence of price fixing overwhelming.

> Thus, both the direct and circumstantial evidence in this case overwhelmingly supports the plaintiffs' allegations that there was price fixing. A summary of the evidence shows without question that this is true. (App. A at 12-13).

The Court of Appeals noted that the evidence of price fixing in this case was stronger than that in *U.S. v. Sigma*, 624 F.2d 461 (4th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 859 (1981) and *Phillips v. Crown Central Petroleum Co.*, 602 F.2d 616 (4th Cir. 1979), *cert. denied*, 444 U.S. 941 (1980), two recent price fixing cases in which certiorari was denied by this Court.

The Court of Appeals also found that fraudulent concealment had been established as a matter of law and that there was sufficient evidence to support a damage award for profits lost at King's operating stations and at the four stations King had to close as a result of Champlin's price fixing activities. The Court of Appeals reversed a damage award for lost profits at six planned,

but unopened, stations and reduced the treble damage award from $2,267,826 to $1,360,770.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS DECISION THAT CHAMPLIN HAD FRAUDULENTLY CONCEALED ITS PRICE FIXING ACTIVITIES AS A MATTER OF LAW DID NOT SANCTION ACTION OF THE DISTRICT COURT WHICH WAS A FUNDAMENTAL DEPARTURE FROM THE USUAL COURSE OF PROCEEDINGS.

Champlin urges this Court to grant a writ of certiorari because the United States Court of Appeals for the Tenth Circuit has "sanctioned conduct of the district court which has flagrantly departed from the usual course of proceedings." Champlin's argument is without merit and insufficient to warrant certiorari in this case. The district court merely ruled, based upon the entire evidentiary record, that Champlin was not entitled to have the issue of whether some — not all — of King's damages were barred by the statute of limitations submitted to the jury. The Court of Appeals conscientiously reviewed the entire record to determine whether an issue of fact existed with regard to Champlin's statute of limitations defense which would have required submission of the issue to the jury. The Court of Appeals did not find such an issue of fact. All that is involved in this case is affirmance of a district court's determination of an issue as a matter of law. Such rulings occur daily and hardly represent such a fundamental and far

reaching departure from the usual course of proceedings as to warrant this Court's intervention.

A. *There Is No Important Question Of Law Or Of Federal Significance Presented By The Petition For Writ Of Certiorari And The Court Of Appeals Decision Does Not Conflict With Decisions Of This Court Or Of Other Federal Courts Of Appeals.*

Nothing in Champlin's Petition raises an issue rising to the level of importance required for this Court's review. Both parties agree that the district court and the United States Court of Appeals for the Tenth Circuit correctly stated the applicable law and there is no conflict among the federal courts of appeal regarding the law of fraudulent concealment. Both the district court and the Court of Appeals conscientiously applied the doctrine of fraudulent concealment to the historical facts of this case. There is therefore no necessity for this Court to review the decision of the Court of Appeals that fraudulent concealment was established as a matter of law. The Court of Appeals has already carefully performed the appellate review function.

The decision of the United States Court of Appeals for the Tenth Circuit in this case is grounded entirely upon the evidentiary foundation of this case alone, and disposition of this case will only affect Champlin and King. In fact, the issue of fraudulent concealment will not affect the ultimate outcome of this litigation, only the amount of money one private litigant must pay to another. While the amount Champlin ultimately has to

pay King because of its hard core price fixing activities may be important to Champlin, it is not of "public importance" sufficient to warrant certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

B. ***The United States Court Of Appeals For The Tenth Circuit Considered The Issue Champlin Now Seeks To Have This Court Review, And After Full And Careful Consideration Of The Record, Correctly Decided That Champlin Had Fraudulently Concealed Its Price Fixing Activities From King.***

1. *Fraudulent Concealment.*

a. ***The Court of Appeals correctly concluded there is not one bit of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy had not been fraudulently concealed.***

Champlin was unable to escape the overwhelming and uncontroverted evidence of fraudulent concealment at trial. The district court therefore decided the issue of fraudulent concealment was not in controversy. On appeal, Champlin urged the Court of Appeals to reverse the district court for the same reasons it raises in its Petition. The Court of Appeals was unimpressed, expressly holding the district court had ample reason for deciding the issue as a matter of law. Now, Champlin tries for a third time, hoping this Court will hold that the determinations of the district court and the Court of Appeals, based upon a review of all the evidence and the

entire record, were wrong. In so doing, Champlin disregards the axiom that "the jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923).

In its decision, the Court of Appeals expressly considered and rejected Champlin's argument in its Petition that there was a question of fact which required submission of the issue of fraudulent concealment to the jury.

> *The question is whether the evidence established fraudulent concealment as a matter of law. The conclusion we reach is that the evidence overwhelmingly supports the proposition that all price fixing activity was concealed by Champlin.* It appears from the record that Mr. Dewey Mason, Champlin's Regional Manager of Product Pricing at the time, prepared a document with two columns of names. One of these was entitled a "talk" column, and contained names of persons to whom they could speak, and the second column was entitled a "no talk" column. The witness Entriken testified that the purpose of the "talk/no talk" document was to separate the names of the reliable people from the names of those who were unreliable, in that they could not keep a confidence. Entriken testified that he was given the document so that he would not place calls to the wrong people. He also testified that he often made his price fixing calls after normal working hours, and that Champlin's price fixing agreements were all made "under cover." In fact, *Champlin's own witnesses, including William Biggersmith, a vice president at Champlin, Kenneth*

Richardson, Champlin's Regional Manager of Marketing Operations, and Mickey Bowles, Champlin's Manager of Product Pricing and Allocation, testified that any conspiracy which Champlin may have been involved in to fix prices of gasoline had been concealed. All of King's witnesses testified that they had not known of Champlin's price fixing activities. The evidence shows that knowledge of the price fixing conspiracy was not revealed to anyone connected with King until 1975, the year that the action was filed.

There is not one bit of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy, if the jury believed that a conspiracy did exist, had not been fraudulently concealed. Since there was no issue of fact for the jury to determine, the trial court correctly determined this issue as a matter of law. Hence *Champlin's contention that this question should have been determined by the jury has neither merit nor substance.*

* * * *

The evidence in this case shows no dispute over the question as to whether the price fixing activities of the defendant were concealed. In fact, the defendant's own employees testified that if there had been a price fixing conspiracy, it had been concealed. There was no indication in the record that plaintiff had been put on inquiry in any way of the defendant's price fixing activities. In the absence of a factual question for the jury to resolve, our holding has to be that the trial court correctly decided this issue as a matter of law. (App. A at 17-19). (Emphasis added).

Despite the Court of Appeals' careful analysis of the record, Champlin contends in its Petition that the

Court of Appeals did not consider two of the three elements of fraudulent concealment.

> However, nowhere does the Court of Appeals even refer to proof on the other two essential elements of the fraudulent concealment issue; whether King knew or by exercise of due diligence could have learned of the price fixing conspiracy prior to October 2, 1971, or could in any way be excused for waiting six to eight years before bringing this lawsuit. (Brief of Petitioner at 15).

The Opinion of the Court of Appeals shows that argument is categorically false.

> All of King's witnesses testified that they had not known of Champlin's price fixing activities. The evidence shows that knowledge of the price fixing conspiracy was not revealed to anyone connected with King until 1975, the year that the action was filed. (App. A at 18).
>
> * * * *
>
> At the time that King was seeing the phenomena of lowering and raising of prices, he was not thereby notified that Champlin was fixing prices. The evidence pertaining to price fixing points to concealment of those activities.
>
> * * * *
>
> There was no indication in the record that plaintiff had been put on inquiry in any way of the defendant's price fixing activities. (App. A at 19-20).

The Court of Appeals correctly applied the doctrine of fraudulent concealment to the historical facts of this case. The tidbits of testimony taken out of context by Champlin were insufficient to require submission of the issue of fraudulent concealment to the jury when viewed

in the context of the *entire* record. The testimony and arguments of counsel cited by Champlin are ambiguous, at best, on the question of King's knowledge of the price fixing conspiracy prior to 1975 and reflect, for the most part, conclusions based upon knowledge obtained by King employees *after* Entriken disclosed the conspiracy in 1975. The decision of the Court of Appeals on the very question this Court is asked to review is fully supported by the uncontroverted fact that when the issue of King's knowledge of the price fixing conspiracy prior to 1975 was put directly to King's employees each stated flatly he had no knowledge of the conspiracy. For example, Bill Belanger testified as follows:

> Q: [By Mr. Hill] Mr. Belanger, would you have knowledge of any facts relating to your company's allegations that Champlin Petroleum Company was somehow involved in an alleged conspiracy to fix the retail price of gasoline in Texas, Oklahoma, and Arkansas, during the years 1970 to 1973?
>
> A: I would have to answer that yes.
>
> Q: When did you get that information?
>
> A: Well, I was here all last week.
>
> Q: Other than your just sitting in the courtroom and hearing, or overheard what somebody said from the witness stand, do you have any personal knowledge?
>
> A: Other than what I heard last week in testimony? Other than that?
>
> Q: I am talking about your personal knowledge that you acquired on your own outside of this courtroom or from hearing someone else talk?
>
> A: No.

The Court of Appeals' decision also rests solidly upon the fact that there is a complete absence of evidence that prior to 1971, King (1) knew of its cause of action against Champlin and (2) that any inquiry would have disclosed the price fixing conspiracy and the decision of Champlin and its co-conspirators to target King. This is especially true in light of the continual denials by Champlin employees of any participation in a price fixing conspiracy throughout discovery and trial. The decisions of the district court and the Court of Appeals were therefore well grounded in the record and upon well-established law. *See*, P. Areeda & D. Turner, Antitrust Law § 325 at 124 (1979) ("[T]he limitations period is tolled by secret conspiracies, such as most clear-cut price-fixing agreements, which are not only created and maintained outside of the public eye, but in which elaborate efforts are taken by the participants to disguise the activities."); *Forbes v. Greater Minneapolis Area Board of Realtors*, 1973-2 Trade Cas. ¶ 74,628 (D. Minn. 1973) (statute of limitations tolled unless plaintiff knew or should have known of cause of action); *Glazer Steel Corp. v. Toyomenka*, 392 F. Supp. 500 (S.D.N.Y. 1974) (if reasonable further inquiry would not have revealed the offense, plaintiff not time barred); *Telex v. IBM*, 367 F. Supp. 258, 360-61 (N.D. Okla. 1973) *aff'd in part, rev'd in part on other grounds*, 510 F.2d 894 (10th Cir. 1975), *cert. dismissed*, 423 U.S. 802 (1975). (statute of limitation's tolled where Telex employees denied misappropriation of trade secrets through trial).

The Court of Appeals decision is especially appro-

priate in light of the fact that Champlin has been adjudged liable for hard core price fixing and does not even challenge that ruling. Allowing Champlin to profit from its destruction of documents and substantial efforts to keep King from learning anything about the price fixing conspiracy would be inequitable and contrary to doctrine of equitable tolling of the statute of limitations.

Champlin might disagree with the district court's exercise of its equity jurisdiction in ruling that Champlin's price fixing was fraudulently concealed as a matter of law and the Court of Appeals' affirmance of that ruling, but that alone cannot justify a writ of certiorari. It is not the function of this Court to determine whether the Court of Appeals or the district court were mistaken as to the interpretation of the evidence. *Ross v. Moffit*, 417 U.S. 600 (1974).

The Court of Appeals' affirmance of the district court's finding that fraudulent concealment was established as a matter of law is consistent with the well-settled legal principle that where there is no genuine issue of fact, a party is entitled to judgment as a matter of law. *Crummer Co. v. DuPont*, 255 F.2d 425 (5th Cir. 1958), *cert. denied*, 358 U.S. 884 (1958). That type of decision does not warrant this Court's review. Moreover, on this record, the district court and the Court of Appeals were patently correct in these determinations.

b. *The decisions of the District Court and the Court of Appeals correctly determined the issue of fraudulent concealment in light of Champlin's theory that the price fixing conspiracy never existed.*

In light of the evidence which Champlin did not controvert, Champlin was not entitled to hide behind a statute of limitations defense:

> When the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized. *Kansas City, Missouri v. Federal Pacific Electric Co.*, 310 F.2d 271, 284 (8th Cir. 1962), *cert. denied*, 371 U.S. 912 (1962).

Champlin apparently recognized that it could not hide behind the statute of limitations because it never litigated any defense based on the statute of limitations. Champlin contended throughout the trial that there was no conspiracy; it did not even attempt to prove that: (1) no fraudulent means had been used to conceal it, or (2) the conspiracy was not successfully concealed from King, or (3) King knew about or should have discovered the conspiracy prior to 1975. In fact, because of its theory of the case, Champlin could not have contended that prior to 1975 King knew of the price fixing conspiracy and that it was targeted by the conspiracy. This was not a case of a "sunshine" conspiracy where some of the price fixing evidence was let out of the "closet" while the conspiracy was on-going.

Champlin's entire defense was, in effect, that the conspiracy did not happen. Champlin did not offer one scintilla of competent evidence that the conspiracy, if it existed, was not a "closet" conspiracy which had been

fraudulently concealed from King and under Champlin's theory of the case, either there was no conspiracy or, if there had been one, it by its very nature had been concealed. Under this theory, there was no separate issue of the statute of limitations; the only issue was whether there was a concealed "closet" conspiracy or nothing at all, and this issue was submitted to and decided by the jury as part of its verdict for King. Given the overwhelming nature of the uncontroverted evidence and Champlin's theory of the case, there simply was no rational basis upon which to submit any statute of limitations issue to the jury. *Upton v. Torbey*, 548 F.2d 316, 320 (10th Cir. 1977); *Hartman v. Miller Hydro Company*, 499 F.2d 191, 193 (10th Cir. 1974).[2] On the record in this case, it would have been error for the court to have submitted the statute of limitations issue to the jury.[3]

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[2] Even assuming a conflict in the evidence on King's knowledge of the conspiracy existed, the action of the district court and Court of Appeals was proper and consistent with the well-established principle that "a directed verdict is proper even though the evidence is in conflict where the overwhelming weight of the evidence favors the moving party." See, Meeker v. Risley, 346 F.2d 521, 525 (10th Cir. 1965).

[3] The district court's rulings on the statute of limitations also were supported by the fact that Champlin waived it at trial by not objecting to the admission of King's damage exhibits on the ground of the statute of limitations and by failing to raise that defense as a ground for a directed verdict. In addition, because the uncontroverted evidence established that there had been fraudulent concealment through much of 1975, the court ruled that it had taken care of the issue of the statute of limitations. This ruling is consistent with well-settled legal precedent. See, e.g., Crummer Co. v. DuPont, 255 F.2d 423, 428 (5th Cir. 1958), cert. denied, 358 U.S. 884 (1958) which states that a directed verdict on the issue of fraudulent concealment is supportable if, as here, there is no genuine issue of fact which the jury could have resolved in favor of the non-moving party. See also, Meeker v. Risley, 346 F.2d 521, 525 (10th Cir.

Champlin asks this Court to direct the Court of Appeals to re-examine the record to determine whether a fact question concerning fraudulent concealment exists. The very nature of this request demonstrates the mundane nature of the issue presented for review by this Court. There is simply no question of law presented by Champlin in its Petition; the question presented regarding fraudulent concealment is *solely* factual. More importantly, the Court of Appeals has already done what Champlin is now asking this Court to direct it to do. The last painstaking review of the entire record by the Court of Appeals did not disclose any factual issue and there is no basis in logic or reason to require them to do it again.

2. *There Was No Judicial Hostility As Claimed.*

The Court of Appeals also expressly considered and rejected Champlin's contention that it was the victim of judicial hostility.[4] Champlin opened its appellate brief

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[3] Continued
1965), wherein it was held that issues of fact are for the jury, but the trial judge has the power to penetrate the evidence and determine whether a purported fact issue is theoretical rather than actual, imaginary rather than real; the trial judge is not required to recognize some theoretical question of fact which is deficient in probative force as against conclusive evidence to the contrary.

[4] As it did on appeal, Champlin refers to the fact that Judge Seay, the district court judge, is going to be a witness in Dea Entriken's malicious prosecution action against Champlin. Champlin's statement that Judge Seay is going to "testify against it" (Brief of Petitioner at 27) is without any foundation in the record and categorically false. Judge Seay did not volunteer to testify in that case and there is absolutely nothing in the record indicating what Judge Seay's testimony might be or that it will be prejudicial to Champlin. Any claim to the contrary is mere speculation and conjecture and not worthy of consideration by this Court. The Court of Appeals paid no attention to the innuendo cast by Champlin and it should not be given credence by this Court either.

by complaining that it was the subject of "inexplicable animosity" by the Court below. The Court of Appeals rejected the claim of judicial hostility raised by Champlin in its Petition with surprising candor.

> In general it is also argued by Champlin that it suffered from the prejudice and animosity shown by the trial judge toward it. From the examination of the record we do not believe that the latter claim has any justification whatsoever. The record discloses that the judge was very patient indeed with Champlin's lawyers. It is true that he ruled against them in many instances but in many instances he was fully justified in doing so. (App. A at 7-8).

C. *Champlin's Petition Does Not Raise Any Constitutional Or Significant Federal Issue But Seeks Only To Have This Court Review The Evidence Which The United States Court Of Appeals For The Tenth Circuit And The District Court Found Established Fraudulent Concealment As A Matter Of Law.*

In the hope that a "constitutional issue" might trigger certiorari, Champlin now contends it was "deprived" of a jury determination on the issue of fraudulent concealment. That argument must fail. First, it is well-settled that granting a directed verdict or deciding an issue as a matter of law does not infringe upon the Seventh Amendment's guarantee of trial by jury. *Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979); *King v. United Beneficial Fire Insurance Co.*, 377 F.2d 728 (10th Cir.

1967), *cert. denied*, 389 U.S. 857 (1967). Second, as Justice Frankfurter noted in dissent in *Dick v. New York Life Insurance Co.*, 359 U.S. 437 (1959), imaginative arguments aside, all that is involved is an impermissible and insufficient request of this Court to appraise the fair inferences to be drawn from the evidence.

> If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, ... This verbal smoke screen cannot obscure the truth that all that is involved is an appraisal of the fair inferences to be drawn from the evidence.

See also, Houston Oil Co. v. Goodrich, 245 U.S. 440, 441 (1918) (where the Court dismissed a writ of certiorari as improvidently granted because the propriety of submitting a matter to the jury depends "essentially upon an appreciation of the evidence").

It is well-settled that certiorari will not be granted to review evidence and discuss specific facts. *U.S. v. Johnston*, 268 U.S. 220, 227 (1925). This is especially so when, as in Champlin's Petition, this Court is asked to review a factual determination made by the district court based upon all of the evidence, which has been affirmed by the United States Court of Appeals for the Tenth Circuit. "[T]his Court, . . . rather than a court for correction of errors in fact finding, cannot undertake the review of concurrent findings of fact by two courts

below in the absence of a very obvious and exceptional showing of error." *Graver Manufacturing Co. v. Linde Company*, 336 U.S. 271, 275 (1949); *Berenyi v. Emigration Director*, 385 U.S. 630, 635 (1967).

Champlin's argument that the issue of fraudulent concealment has not been decided as a matter of law in plaintiff's favor in two hundred thirteen reported cases is misleading and its argument that it hasn't happened before is false.[5] In *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), the defendant appealed from a judgment

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[5] The citation of 213 decisions, not cases, by Champlin is a gross effort to mislead this Court that should not be condoned or sanctioned. Apparently, the decisions were not read because the overwhelming majority of the cases have nothing to do with the issue raised in Champlin's Petition. For example, most of the decisions involve (1) motions to dismiss complaints, (2) motions to strike allegations of fraudulent concealment, (3) motions for class certification, (4) motions for approval of class action settlements, (5) motions to transfer and (6) motions for intervention. Almost none of the decisions involved disposition of the fraudulent concealment issue in the context of a jury trial. Finally, some of the decisions did not even address the issue of fraudulent concealment. See, e.g., In Re Corrugated Container Antitrust Litigation, 655 F.2d 748 (7th Cir. 1981) (order holding non-party witness in contempt for asserting Fifth Amendment privilege at deposition reviewed); Al-Jundi v. Rockefeller, 88 F.R.D. 244 (W.D.N.Y. 1980) (motion to substitute estate of Rockefeller for deceased defendant); LeVine v. McDonald's Corp., 1979-2 Trade Cas. ¶ 62,730 (D. Ariz. 1979) (antitrust complaint dismissed for failure to comply with Rule 8, Fed. R. Civ. Proc.; no mention of statute of limitations or of fraudulent concealment); SCM Corp. v. Radio Corp. of America, 276 F. Supp. 373 (S.D.N.Y. 1967), aff'd, 407 F.2d 166 (2d Cir. 1969), cert. denied, 395 U.S. 943 (1969) (no mention of statute of limitations being tolled by fraudulent concealment).

None of the 213 decisions stands for the proposition that the issue of fraudulent concealment must be submitted to the jury in all cases or that it cannot be decided as a matter of law for a plaintiff. If that proposition existed, Champlin could have simply cited the case supporting the proposition and would not have had to engage in the travesty of citing 213 decisions. Finally, some of the decisions decided the issue of fraudulent concealment as a matter of law and support the position of

entered on a jury verdict assessing damages against him for violation of Section 17(a) of the Securities Act of 1933, contending that the plaintiffs' action was barred by the applicable statute of limitations and that the district court committed reversible error *by refusing to submit the issue of the statute of limitations to the jury.* The United States Court of Appeals for the Fourth Circuit expressly affirmed the lower court's determination as a matter of law that the statute of limitations did not bar the plaintiffs' action and that the matter was properly not submitted to the jury.

> . . . [H]ere the record conclusively establishes that the action is not barred by the two-year statute.
>
> * * * *
>
> [T]here is no evidence that the purchasers discovered, or in the exercise of due diligence should have discovered, the fraud in the interval between January 28 and April 17, 1970. *The court, therefore, was not obliged to submit this issue to the jury.* 518 F.2d at 100. (Emphasis added.)

In *Newman*, the court expressly ruled on plaintiffs' due diligence in discovering the fraud as as matter of law. Of course, due diligence is one of the elements of fraudulent concealment. The *Newman* decision is not the only one squarely holding that a statute of limitations

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[5] Continued

King. See, Piccuit v. Ralston Purina Co., 1969 Trade Cas. ¶ 72,681 (S.D.N.Y. 1969) (court held that (1) issue of whether statute of limitations has been tolled is question of law and (2) granted defendant partial summary judgment); State of Minnesota v. U.S. Steel Corp., 44 F.R.D. 559 (D. Minn. 1968) (filing of class action tolls statute of limitations as a matter of law as to absentee plaintiffs).

issue may be decided as a matter of law for a plaintiff. *See, Mt. Hood Stages v. Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir. 1980), *cert. denied*, 449 U.S. 831, 101 S.Ct. 1488 (1980), where the plaintiff raised for the first time in a post trial brief the issue of whether the statute of limitations was tolled by equitable principles and the United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling that the statute of limitations was tolled as a matter of law, despite Greyhound's argument that it was entitled to have the issue submitted to the jury.[6]

Even if there were no decisions disposing of a statute of limitations issue in favor of a plaintiff as a matter of law, Champlin's argument that its statute of limitations defense could not be decided as a matter of law for King misses the mark and is unpersuasive. First, Champlin does not argue that the issue *cannot* be decided as a matter of law. In fact, it is frequently disposed of in that fashion.[7] *See, e.g., Ohio v. Peterson, Lowry, Rall,*

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[6] The decisions in Newman and Mt Hood Stages, as well as the Court of Appeals' decision in this case are all consistent with established precedent that a verdict may be directed in favor of the party having the burden of proof. See, Service Auto Supply Co of Puerto Rico v. Hartz & Co., 533 F.2d 23, 25 (1st Cir. 1976).

[7] The district court acted well within its discretion in ruling as a matter of law that the issue of statute of limitations would not be submitted to the jury. Fraudulent concealment is another form of equitable tolling, Holmberg v. Armbrecht, 327 U.S. 392 (1946); Westinghouse Electric Corp. v. Pacific Gas & Electric Co, 326 F.2d 575, 576 (9th Cir. 1964), and as Chief Justice Burger has recently noted in Mt. Hood Stages, Inc. v. Greyhound Corp., 437 U.S. 322, 338 (1978), "The authority of a federal court, sitting as a chancellor, to toll a statute of limitations on equitable grounds is a well-established part of our jurisprudence." Equity issues, such as fraudulent concealment, are traditionally decided by the court, even within the context

Barber & Ross, Fed. Sec. L. Rep. ¶ 97,880 (10th Cir. 1981); *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977); *Goldstandt v. Bear, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975); *Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978). Champlin simply argues that such an issue can be properly decided as a matter of law for defendants but not plaintiffs. Such an argument is ludicrous and finds no support in the case law, logic, the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Furthermore, this case was decided upon its own facts, and the propriety of any ruling as a matter of law must necessarily depend upon an analysis of the evidence in this case. The fact that evidence presented by plaintiffs in other cases, if true, did not establish fraudulent concealment as a matter of law does not and cannot diminish in any way the overwhelming and uncontroverted evidence of fraudulent concealment in this case.

II. THE COURT OF APPEALS PROPERLY AWARDED INTEREST ON ATTORNEY'S FEES.

Champlin's request for certiorari with respect to the lower court's award of interest on the entire judgment, including that portion of the judgment which consists of attorney's fees, should likewise be denied. 28 U.S.C.

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[7] Continued

of a damage action. See, Ross v. Bernhart, 396 U.S. 531, 538 (1970) ("The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action"); West v. Devitt, 311 F.2d 787, 788 (8th Cir. 1963) (no right to jury trial of laches defense to damage claims); Dawson v. Contractors Transport Corp., 467 F.2d 727, 733 (D.C. Cir. 1972) (no jury trial on equitable cross-claim for contribution in negligence action).

§ 1981 expressly provides that "interest shall be allowed on any money judgment in a civil case recovered in a district court." The Court of Appeals merely acted in accordance with the express statutory mandate of § 1981.

The only authority cited in *Carpa, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978) for its denial of interest on attorney's fees was an earlier diversity case applying Texas law, even though it recognized that accrual of interest in federal question cases is controlled by federal law. 567 F.2d at 1322. Section 1981 governs interest on "money judgments," not "costs" or "damages". The Court of Appeals was therefore correct in following *Perkins v. Standard Oil Company of California*, 487 F.2d 672, 675 (9th Cir. 1973) for, as explained in *Perkins*, "once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed." This is the only reasonable construction of § 1981 of the Judicial Code and has therefore led many other courts to allow interest on awards of attorney's fees.[8] *See, Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir. 1980), *cert. denied*, 449 U.S. 831, 101 S.Ct. 1488 (1980); *Lew Wenzel & Co., etc. v. London Litho Supply Co., Inc.*, 563 F.2d 1357 (9th Cir. 1977); *City of Detroit v. Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1978); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1198 (6th Cir. 1974), *cert. denied*, 422 U.S. 1048 (1975); *Harris v. Chicago Great Western*

[8] If, as Champlin contends, this issue has arisen in hundreds of cases and has not been decided by this Court, there is nothing unique about this case which now compels certiorari on this issue.

Ry., Co., 197 F.2d 829, 836 (7th Cir. 1952). *Carpe* is a mere aberration, contrary to the weight of authority on a trivial issue, and does not warrant a writ of certiorari by this Court.

CONCLUSION

King respectfully submits that the Petition for Writ of Certiorari in this case should be denied.

DATED this ..... day of November, 1981.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

On behalf of King & King Enterprises, d/b/a King Gas & Oil, and Carl R. King, d/b/a King Gas & Oil, and pursuant to Supreme Court Rules 19.3, 28.3, and 28.5(c), I have caused three copies of this Brief in Opposition to be served by mail upon:

William Simon
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

counsel of record for Champlin Petroleum Company, petitioner. These documents were deposited in a United States mailbox, with first-class postage prepaid, this ..... day of November, 1981.

All parties required to be served have been served.

Gary F. Bendinger
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Subscribed and sworn to before me this ..... day of November.
November, 1981.

.....
Notary Public

My Commission Expires: .....

Appendix 2

Office - Supreme Court, U.S.
FILED
NOV 30 1981

No. 81-929

In the Supreme Court of the United States

October Term, 1981

CHAMPLIN PETROLEUM COMPANY,

Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

APPENDIX

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November, 1981

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1630

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,

Plaintiffs-Appellees,

v.

CHAMPLIN PETROLEUM COMPANY,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 75276-C)

Richard W. Giauque, Berman & Giauque, Salt Lake City, Utah, (Gary F. Bendinger and James R. Holbrook, Berman & Giauque, Salt Lake City, Utah, with him on the brief), for Plaintiffs-Appellees.

Cecil E. Munn, Cantey, Hanger, Gooch, Munn & Collins, Fort Worth, Texas, (Charles A. Zubieta, Champlin Petroleum Company, A. Camp Bonds, Bonds, Matthews, Bonds & Hayes, Muskogee, Oklahoma, and Mark C. Hill, Cantey, Hanger, Gooch, Munn & Collins, Fort Worth, Texas, with him on the brief) for Defendant-Appellant.
Before SETH, Chief Judge, and BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

King & King were plaintiffs below in a private antitrust action which arose under § 1 of the Sherman Act, 15 U.S.C. § 1, 1980. Champlin Petroleum Co. is the defendant and the appellant. The complaint alleged violations of both § 1 and § 2 of the Sherman Act. Also there is a third party action against one Fred Dea Entriken, a former Champlin employee. In this third party claim it is alleged that if Champlin was found liable in the King action that Entriken should be held responsible for the damages which Champlin is required to pay. Entriken filed a fourth party action against Mickey Bowles and Dewey Mason, two of his superiors during the time he was employed by Champlin. There he alleged that he had acted in accordance with instructions and with company policy. Prior to the trial King withdrew his claims against Champlin under § 2 of the Sherman Act for predatory and coercive pricing and refusal to deal. The trial began on April 21, 1980 on King's claim of price fixing under § 1 of the Sherman Act and the issue and amount of damages, and on the third and fourth party claims. The jury found in favor of King on the price fixing claim against Champlin and in favor of Entriken on the third party action. Champlin appeals herein from the judgment against it on the price fixing claim. It does not appeal the judgment on the third party action.

STATEMENT OF THE FACTS

King and King Enterprises is owned by Carl King and Fred King; the company markets gasoline. King Gas and Oil Company operates retail gas stations in

Oklahoma, Arkansas and Texas. This latter company is a sole proprietorship which is owned by Carl King. King and King Enterprises supplies gasoline to the King gas stations.

Champlin Petroleum Company is an integrated oil company which refines gasoline and sells gasoline at both levels, retail and wholesale, in Oklahoma, Arkansas and Texas under the brand names of Champlin and Harbor.

When King entered the gasoline market in Oklahoma, Texas and Arkansas, which was in 1966 or 1967, there were three types of retail gasoline marketers. At the top were the major oil companies such as Texaco, Shell and Phillips, which companies were vertically integrated in that they operated refineries and sold gas both at wholesale and retail levels. These companies operated full service gas stations and sold products other than gas, such as batteries, tires, and accessories. They advertised and accepted credit cards.

In the middle were the mini-majors or branded independents such as Champlin, Apco, Consumers and Fina. These stations generally were the full service type. They operated in the same fashion as the majors but did not have the national reputation enjoyed by the majors and sometimes were not vertically integrated. Below the "mini-majors" were full service unbranded independents, such as Hudson Oil Co.

At the time (1966, 1967) King entered the gas market in the states mentioned above, the majors' normal price for regular gasoline was 34.9 cents per gallon.

The mini-major normal price for regular gasoline was 32.9 cents per gallon, and the branded independent's normal price for regular gasoline was 31.9 cents per gallon. The difference in the prices of gasoline between the three types of stations was called a "spot." By this is meant that the mini-majors had a two cent spot on the majors and the unbranded independents had a one cent spot on the mini-majors. King was and is a self-service unbranded independent marketer. It decided to take a two cent spot on Hudson and other full service independents, and to charge 29.9 cents per gallon for regular gas. King had determined that this was its optimum price, which would allow it to maximize gross profits and volume of sales. Prior to King's entry in the market there were no unbranded self-service independents who took a spot on the mini-majors and full service unbranded independents. King was an admitted price cutter and was the first self-service marketer to attempt to take such a spot.

GENERAL NATURE OF THE CASE

King alleged that Champlin freely and regularly exchanged market information with its competitors, not including King however, and entered into price fixing agreements with those competitors for the purpose of forcing King, and other self-service unbranded independents who proceeded as King was proceeding in taking a spot on the full service unbranded independents, to eliminate their spot, and, thus, to eliminate price cutting. It was the claim of King that Champlin first tried to dictate King's selling price by threatening to take the price of gas "to the bottom," that is, below King's actual

cost for the gas, if King refused to eliminate its spot. When King failed to do so, Champlin and his co-conspirators collusively agreed to lower prices below an acceptable level to King and restore prices to normal once they felt King had suffered by low prices to such an extent that King would be willing to surrender. King alleged that the method employed to accomplish the goals was as follows:

Champlin and its co-conspirators granted competitive price allowances (CPAs) to their dealers. Under the competitive price allowances Champlin and others would guarantee their dealers a certain margin of profit, so that even when the dealers were selling gas at lower than normal prices, the dealers were still able to make a dependable margin of profit. Thus, Champlin and its co-conspirators, rather than their dealers, would absorb the loss caused by the sale of gasoline at lower than normal prices. Champlin and its competitors would recommend that their dealers sell at lower than normal prices and the dealers would still make a profit. Prices would go down in a stairstep pattern with King reducing his prices accordingly to keep his spot. When prices reached the bottom, that is at or near the cost of the gasoline to King, the Champlin dealers were guaranteed a profit because of the competitive price allowances, while King, who did not receive these allowances, was forced to absorb the entire loss caused by the price decreases. This CPA program, of course, cost Champlin and its co-conspirators a great deal of money. Thus, as soon as practicable the companies were anxious to restore the market to its normal level by pulling back the CPAs

when it was felt that King had been sufficiently harmed and would be ready to surrender. Therefore the companies conspired to pull their CPAs and fix the price of gasoline at a certain level. As a result of Champlin's price fixing activities, King alleges that it was unable to sell gasoline at its optimum price and was injured thereby.

Champlin, on the other hand, rather than directly addressing King's price fixing claims, appears to have been arguing that: "If King has any cause of action at all, it is one for predatory and coercive pricing; but King doesn't have a claim for predatory and coercive price because . . . ." The appellant's contentions caused great confusion during the trial of the case for the reason that they were insisting on being allowed to defend a predatory and coercive pricing claim, whereas the only claim that was being litigated by the plaintiffs was one of price fixing. It should be brought out here and now that regardless of appellant's thought that King's claim should have been for predatory and coercive pricing, a claim which it was apparently prepared to defend itself against, the fact remains that King did confine itself to a claim for price fixing at the trial. King had withdrawn its claim based on predatory and coercive pricing prior to trial. So, inasmuch as predatory and coercive pricing was not a claim at the trial, it was not possible for the appellant, Champlin to offer a defense against such claim. Much of the evidence which appellant sought to introduce at trial was therefore rejected by the trial court. Because of the lack of effective communication between the parties, the lawyers for both spent a great deal of

time at the bench arguing evidentiary matters to the judge out of the presence of the jury.

Champlin raises several questions on this appeal:

1. That it was error for the trial court to receive in evidence testimony of Mr. Caldwell, an expert witness called by the plaintiffs, regarding calculations which he made as to the sum total of losses suffered by plaintiffs during the years in question.

2. That it was error to refuse to instruct the jury on the law applicable to predatory and coercive pricing and refusal to deal.

3. That it was error to refuse to present the jury with the question of whether plaintiffs' claim was barred by the statute of limitations.

4. That the court erred in massive exclusions of evidence for the defense, in that the court (a) failed to allow Champlin to deny accusations against it; (b) precluded Champlin from proving its economic incapacity to rig the market; (c) precluded Champlin from refuting predatory pricing claims; (d) precluded Champlin from challenging the Caldwell calculations.

5. That it was error to foreclose Champlin's use of depositions of parties and managing agents.

In general it is also argued by Champlin that it suffered from the prejudice and animosity shown by the trial judge toward it. From the examination of the record we

do not believe that the latter claim has any justification whatsoever. The record discloses that the judge was very patient indeed with Champlin's lawyers. It is true that he ruled against them in many instances but in many instances he was fully justified in doing so.

DEFINITION AND EVIDENCE IN SUPPORT OF CONTENTION OF PLAINTIFFS THAT DEFENDANT WAS GUILTY OF PRICE FIXING

Section 1 of the Sherman Act provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states, or with foreign nations, is declared to be illegal. . . .

Price fixing agreements are per se violations of § 1 of the Sherman Act. Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S.Ct. 1925 (1980); United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978); United States v. Container Corp. of America, 89 S.Ct. 510 (1969); United States v. Socony-Vacuum Oil Co., 60 S.Ct. 811 (1940), reh. den. 310 U.S. 658; Bryan v. Stillwater Board of Realtors, 578 F.2d 1319 (10th Cir. 1977); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979); United States v. Sigma, 1980 - 1 Trade CAS. ¶ 63, 097 (4th Cir. 1979).

If the defendants' purpose was to fix prices, it is not material that they had reasonable goals for doing so. United States v. Socony-Vacuum Oil Co., *supra;* United

States v. McKesson and Robbins, Inc., 76 S.Ct. 1937 (1956). In *Socony-Vacuum Oil* the Supreme Court considered an alleged conspiracy to raise gasoline prices for the purpose of stabilizing the market. The Court found that the defendant's purpose was to fix prices, and the evidence showed that the conspiracy at least contributed to the rise in prices. The Court stated that the fact that other factors may also have contributed to the price rise was not material. It was held that even if the purpose of the conspiracy was to eliminate the evils within the system, with an aim of establishing more reasonable and more fair prices, the conspiracy was nevertheless violative of the Sherman Act. The Court held there exists no justification for price fixing in a free economy. Therefore, the Court found that it was permissible to exclude evidence seeking to show the reasonableness of the conspiracy, since such evidence is irrelevant under the Sherman Act. The Court stated that an agreement among competitors to follow a practice of buying surplus gas on the spot market for the purpose of preventing prices from falling sharply was unlawful, regardless of how reasonable it was believed to be, even though there was not shown to be a direct agreement among the conspirators in the actual prices which were being maintained.

In McKesson and Robbins, *supra*, the Supreme Court said:

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants

> possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or decrease prices.

76 S.Ct. at 940. The Supreme Court further stated:

> Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy. (citation omitted).

Id. at 943-44.

Illegal price fixing includes informal and indirect, as well as formal and direct, agreements to exchange price information or fix prices. Catalano, Inc. v. Target Sales, *supra;* United States v. Container Corporation of America, *supra.* In *Catalano,* the charge was that respondent wholesalers secretly agreed to sell to retailers only if payments were made in advance or upon delivery. That is, the wholesalers agreed to limit all credit sales, whereas before the agreement the wholesalers had competed with one another in regard to the granting of credit and the terms thereof. The majority of the court of appeals held that the agreement to withhold credit did not constitute price fixing. The dissent disagreed on the ground that the extension of interest free credit is an indirect price reduction, and elimination of such credit was thus a method of raising prices. The Supreme Court agreed with the dissent, and reversed the decision of the court of appeals. The Supreme Court stated that the mere fact that a practice entailing a risk of obvious anti-

competitive impact "may turn out to be harmless in a particular set of circumstances will not prevent it being declared illegal per se." 100 S.Ct. at 1928.

Furthermore, in Container Corporation of America, *supra*, the defendant's activity included an agreement to exchange price information, but no agreement to adhere to a price schedule as in United States v. Sacony-Vacuum Oil Co., *supra*. The Supreme Court's holding was that the result of this reciprocal exchange of price information was to stabilize prices, since when one competitor received knowledge of another competitor's price, he ordinarily matched that price. The holding was that this reduction of price competition constituted price fixing. The Court said "[p]rice is too critical, too sensitive a control to allow it to be used in even an informal manner in order to restrain competition." 89 S.Ct. at 513. *See also,* American Column and Lumber Co. v. United States, 42 S.Ct. 114 (1921).

The Supreme Court's strict enforcement of the prohibition against suppressing competition is emphasized in National Society of Professional Engineers v. United States, 98 S.Ct. 1355 (1978). There the Court held that an agreement among competitors to refuse to discuss prices with customers until after negotiations had resulted in the selection of an engineer restricted trade within the meaning of § 1 of the Sherman Act. The Court reached this conclusion even though the defendant's activity was not express price fixing. Thus the ruling was that the agreement operated as an absolute ban to competitive bidding, as a result of which custom-

ers were deprived of the ability to compare prices when selecting engineering services.

It has also been held that price fixing can be shown by direct or circumstantial evidence. *Interstate Circuit, Inc. v. United States*, 59 S.Ct. 467 (1939); *Edward J. Sweeney and Sons v. Texaco*, 637 F.2d 105 (3rd Cir. 1980); *Cackling Acres, Inc. v. Olson Farms, Inc.*, 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). In *Interstate Circuit*, the Supreme Court stated that "[i]t is elementary that an unlawful conspiracy may be and often is formed without simultaneous agreement on the part of the conspirators." *See* 306 U.S. 227, 59 S.Ct. at 474. In *Sweeney*, the court held that direct proof of an express agreement is not a requisite, that the plaintiff may rely on an inference of a common understanding drawn from basic evidence, although not from mere speculation.

It is also a requisite that the evidence is to be considered as a whole to determine whether a price fixing conspiracy existed and whether defendants were part of that conspiracy. Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962); Cackling Acres v. Olson Farms, *supra*. In *Cackling Acres* it was said by this court that "a conspiracy must be judged by its constituent parts and the jury must look at the alleged conspiracy in its totality. A conspiracy may be implied by a course of conduct and other circumstantial evidence." 541 F.2d at 245. This proposition is somewhat fundamental. However, it is entitled to be particularly considered in the case at bar because much of the evi-

dence deals with the raising of prices rather than the lowering of prices. Yet, the fact that there was a secret and well organized effort to fix prices certainly establishes that the defendants were engaged in both as part of the whole scheme. Thus, both the direct and circumstantial evidence in this case overwhelmingly supports the plaintiffs allegations that there was price fixing. A summary of the evidence shows without question that this is true.

One of the witnesses, Dea Entriken, who was formerly assistant Regional Manager of Product Pricing at Champlin, testified at some length that his job at Champlin required him to call competitors and arrange to pull their CPAs and raise the retail price of gas to a certain level at a certain date. Two of Champlin's competitors, Jim Ozment and Robert Alves, also testified to talking with Entriken on the phone for that purpose. Becky Rhoads, who was one of Champlin's pricing clerks, testified that Entriken and his immediate supervisor, Dewey Mason, Champlin's Regional Manager of Product Pricing, were talking to competitors on the phone and were agreeing on prices. Gail Campbell, another of Champlin's pricing clerks, testified that Entriken and Mason were talking with others on the phone in an effort to restore the gas market to normal.

Records which were kept by Entriken during the course of his employment at Champlin, including notes made while he was talking on the phone, revealed his conversations with competitors on the matter of setting future prices. The notes showed such statements as "all

are committed," and such and such a company "will move to 31.9," and these companies "will 31."

There was a "talk/no talk" document which had been prepared by Mason and given to Entriken. Entriken testified that the purpose of this document was to distinguish those competitors it was safe to talk with about prices, because they would maintain the confidentiality of the conversations, from those Entriken should not talk with for the opposite reason. Bob Parker of FINA was originally on the "no talk" column. Later, Mason gave Entriken a note which said it was now okay for Entriken to talk to Parker. Entriken testified that after receiving that note he talked with Parker about future price moves.

Mason himself testified that he spent a great deal of time talking to competitors, in an effort to find out what was happening in the market. Mason, however, denied giving and receiving specific information about future price moves.

Entriken and Mason each had approximately 500-1200 phone conservations per month with competitors.

The evidence showed price uniformity between Champlin and its competitors during the relevant period.

Fred King and Sam Olson, King's former supervisor, testified that Champlin and its co-conspirators called them many times to attempt to convince King to eliminate its spot, and King refused.

This evidence strongly supports King's claim that Champlin was involved in a collusive effort to attempt to force King to eliminate its spot by first bringing prices down, and then agreeing to bring prices up, so that King could not sell gas at optimum prices. *See also,* United States v. Sigma, *supra,* and Phillips v. Crown Central Petroleum Co., 602 F.2d 616 (4th Cir. 1979), *cert. denied,* 100 S.Ct. 1021 (1980), where plaintiffs made similar claims to the claims at bar. The courts held that the evidence was sufficient to show a price fixing conspiracy. The evidence of price fixing in the latter cases was not as strong as the evidence in the case at bar.

This legal and factual background provides the basis for proceeding to address Champlin's contentions on this appeal.

ARE THE CLAIMS OF THE PLAINTIFFS BARRED BY THE STATUTE OF LIMITATIONS?

Section 4 B of the Clayton Act, as amended, (15 U.S.C. § 15b) requires that antitrust actions be commenced within four years of the date the cause of action accrued. The complaint here in question was filed on October 2, 1975. Defendant-appellant maintains that a percentage of the plaintiff's claims which arose prior to October 2, 1971 were barred by the statute of limitations, or, in the alternative, that the question should have been submitted to the jury. It is the position of the plaintiffs that there has been fraudulent concealment through the undercover actions of the defendant-appellant and that this tolls every federal statute. Holmberg v. Armbrecht, 327 U.S. 392, 66 S.Ct. 582 (1946); Public Serv-

ice Co. v. General Electric Co., 315 F.2d 306 (10th Cir. 1963), *cert. denied*, 374 U.S. 809; King and King Enterprises v. Champlin Petroleum Co., 446 F.Supp. 906 (E.D. Okl. 1978). The allegation to the effect that Champlin and its co-conspirators were guilty of fraudulent concealment of their illegal conduct and of their conspiracy is set forth with particularity in the complaint.

In Ashland Oil Co. of Cal. v. Union Oil Co. of Cal., 567 F.2d 984, 988 (T.E.C.A., 1977), *cert. denied*, 435 U.S. 994 (1978) the court said:

> [w]here acts causing injury are fraudulently concealed from the injured party or where fraud furnishing the basis of an action is of such nature as to conceal itself, a statute of limitation is tolled until the injured party discovers, or with due diligence could have discovered, the injury. (citations omitted). It is clear, however, that mere ignorance on the part of a plaintiff is not sufficient. (citation omitted.)

The Temporary Court of Appeals further said that to prevail on its claim that the statute of limitations was tolled, plaintiff "would have to establish either that the defendant fraudulently concealed the conduct forming the basis of the claim or that the defendant's conduct by reason of its fraudulent nature was inherently self-concealing."

In our case both parties agree that the district court, in an earlier proceeding involving this case, correctly stated the applicable law. The court's language is as follows:

> The party asserting the fraudulent concealment doctrine has the burden of showing (1) the use of fraudulent means by the party who raises the ban of the statute; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action. (citations omitted)
>
> . . . .
>
> [O]nce it appears that the statute of limitations has run, the plaintiff must sustain the burden of showing not merely that he failed to discover his cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. (citation omitted).

King and King Enterprises v. Champlin Petroleum Co., *supra*, 446 F.Supp. at 911. The district court also said:

> A denial of an accusation of wrongdoing does not constitute fraudulent concealment. Dayco Corp. v. Firestone Fire & Rubber, Co., 386 F. Supp. 546, 549 (N.D. Ohio 1974), aff'd, 523 F.2d 389 (6th Cir. 1975). The statute of limitations is not tolled on account of a party's failure to discover, Public Service Co. v. General Electric Co., 315 F.2d 306, 310 (10th Cir.), *cert. denied*, 374 U.S. 809, 83 S.Ct. 1695, 10 L.Ed.2d 1033 (1963), and, in the absence of a fiduciary duty between the parties, mere failure to disclose the existence of a cause of action does not constitute fraudulent concealment. Kansas City v. Federal Pacific Electric Co., 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912, 83 S.Ct. 256,

> 9 L.Ed. 171 (1962); Burnham Chemical Co. v. Borax Consolidated, 170 F.2d 569, 577 (9th Cir. 1948), *cert. denied*, 366 U.S. 924, 69 S.Ct. 655, 93 L.Ed. 1086 (1949); Dayco Corp. v. Firestone Tire & Rubber Co., 386 F.Supp. 546, 549 (N.D. Ohio 1974), aff'd, 523 F.2d 389 (6th Cir. 1975). *See*, Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964); Moviecolor Ltd. v. Eastman Kodak Co., 288 F.2d 80, 87 (2nd Cir.), *cert. denied*, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961).

Id. at 912.

The question is whether the evidence established fraudulent concealment as a matter of law. The conclusion we reach is that the evidence overwhelmingly supports the proposition that all price fixing activity was concealed by Champlin. It appears from the record that Mr. Dewey Mason, Champlin's Regional Manager of Product Pricing at the time, prepared a document with two columns of names. One of these was entitled a "talk" column, and contained names of persons to whom they could speak, and the second column was entitled a "no talk" column. The witness Entriken testified that the purpose of the "talk/no talk" document was to separate the names of the reliable people from the names of those who were unreliable, in that they could not keep a confidence. Entriken testified that he was given the document so that he would not place calls to the wrong people. He also testified that he often made his price fixing calls after normal working hours, and that Champlin's price fixing agreements were all made "under cover." In fact, Champlin's own witnesses, including William Biggersmith, a vice president at Champlin, Kenneth

Richardson, Champlin's Regional Manager of Marketing Operations, and Mickey Bowles, Champlin's Manager of Product Pricing and Allocation, testified that any conspiracy which Champlin may have been involved in to fix prices of gasoline had been concealed. All of King's witnesses testified that they had not known of Champlin's price fixing activities. The evidence shows that knowledge of the price fixing conspiracy was not revealed to anyone connected with King until 1975, the year that the action was filed.

There is not one bit of evidence in the record from which the jury could have entertained the thought that the price fixing conspiracy, if the jury believed that a conspiracy did exist, had not been fraudulently concealed. Since there was no issue of fact for the jury to determine, the trial court correctly determined this issue as a matter of law. Hence Champlin's contention that this question should have been determined by the jury has neither merit nor substance.

Champlin maintains that the fact that King lowered its prices below its desired level where he could make a profit in order to meet predatorily low prices charged by Champlin and subsequently raised its prices above the desired level because of coercion by Champlin. Champlin claims that this is contradictory of any claim of fraudulent concealment. Champlin argues that since King knew that Champlin was lowering and raising prices in a manner alleged to be illegal, there was no fraudulent concealment. Champlin has missed the target. King did not claim at this trial that it was injured by virtue of predatory pricing. It claimed to have been injured as a

result of a concealed conspiracy by Champlin and other co-conspirators to fix prices. Mere knowledge that Champlin was raising and lowering prices does not provide knowledge that Champlin was agreeing with other members of the gasoline industry to fix prices. At the time that King was seeing the phenomena of lowering and raising of prices, he was not thereby notified that Champlin was fixing prices. The evidence pertaining to price fixing points to concealment of those activities.

It is true that where there is a dispute as to the existence of fraudulent concealment, the question is one for the jury. *See*, Robertson v. Seidman and Seidman, 609 F.2d 583 (2nd Cir. 1979); Pan American Petroleum Corp. v. Orr, 319 F.2d 612 (5th Cir. 1963); Crummer Co. v. DuPont, 255 F.2d 425 (5th Cir. 1958), *cert. denied* 358 U.S. 884. The evidence in this case shows no dispute over the question as to whether the price fixing activities of the defendant were concealed. In fact, the defendant's own employees testified that if there had been a price fixing conspiracy, it had been concealed. There was no indication in the record that plaintiff had been put on inquiry in any way of the defendant's price fixing activities. In the absence of a factual question for the jury to resolve, our holding has to be that the trial court correctly decided this issue as a matter of law. Both of the tests which were set forth in Ashland Oil Co., *supra*, were met here. The evidence showed that the defendant actively sought to conceal its price fixing activities, and the defendant's conduct, by reason of its fraudulent nature, was inherently self concealing.

WAS THE AWARD OF DAMAGES EXCESSIVE?

The allegation of the plaintiffs was that it suffered damages in the amount of $755,942 as follows: $270,-919 for twelve operating gas stations; $302,352 for six planned stations that were never opened, and $182,641 for four stations that were closed. However, the jury awarded plaintiffs the sum of $1,205,942 (before trebling) which consisted of $450,000 in excess of the amount requested. The trial court reduced the judgment by remittitur to $755,942 and trebled that amount pursuant to 15 U.S.C. § 15. The consequential total amount of damages was $2,267,826. Neither party appealed the remittitur action of itself. Champlin appeals the award of $755,942 prior to trebling on several grounds. One of these was that which we have already discussed, that a segment of the damages were barred by the statute of limitations. Additionally, Champlin maintains that the evidence does not support the damages and that the method employed by King's accountant, Grant Caldwell, to calculate damages was unreliable. Champlin argues that the Caldwell calculations should not have been admitted into evidence.

The law on establishing damages in antitrust actions has been well defined. First, it is necessary to show that there is a causal connection between the defendant's actions violative of the Sherman Act and the actual injury to the plaintiffs' business. Second, once the causal connection is established, it is necessary to quantify the amount of damages sustained by the plaintiff. Establishing damages in an antitrust action, therefore, involves a two step process.

With respect to the first step, the establishment of a causal link, the Supreme Court stated in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, n. 9, as follows:

> [The plaintiffs] burden of proving the fact of damages under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

With respect to the second step, the quantification of damages, the Supreme Court has stated that in antitrust cases a plaintiff is not to be held to a rigid standard of proof regarding the amount of damages, since in such cases economic harm is frequently intangible and difficult to quantify. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-65 (1931). However, damages may not be merely speculative. There must be reasonable evidence from which a jury can rationally infer the amount of damages. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946). It is against this background that we must review the challenges of appellants.

Champlin's position that the award of damages should not be upheld is predicated upon three decisions which they have cited: Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973);

Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Licquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); and Continental Baking Co. v. Utah Pie Co., 396 F.2d 161 (10th Cir. 1968), *cert. denied*, 89 S.Ct. 136. In all of these cases, the courts held that there was an inadequate evidentiary basis for quantification of the plaintiffs' damages. On that ground the courts held that damages based on the accountant's calculations could not be upheld.

In *Gray*, the figures which the accountant was given by the plaintiffs as a basis for his calculations of lost profits were based on plaintiffs' "feelings" that they were entitled to additional margins of profit, and the purely speculative claim that their retail gas prices could have been raised six cents per gallon without any resultant loss in the volume of gasoline sales.

In *Hawaiian Oke*, the figures relied upon by the accountant in determining losses were found to have been expressly contradicted in the record. In addition, the accountant in *Hawaiian Oke* based his calculations of lost profits partially on a projected growth rate.

In *Utah Pie* the exhibits relied on by the accountant in computing lost profits against one of the defendants were found to have "presented a clearly erroneous factual foundation for the computation of damages." 396 F.2d at 191. Moreover, it was found by this court that the evidence showed that plaintiffs' damages were not caused by Sherman Act violations of the defendants, but were caused by other reasons altogether. Therefore, it was

concluded that plaintiffs' claims for damages for injury to its goodwill were based on mere hypothetical predictions.

In our judgment, Champlin's reliance on these cases is inadequate and misplaced. A reading of the record in the case clearly indicates that the evidentiary problems present in *Gray, Hawaiian Oke* and *Utah Pie* are not present here. We will, however, discuss the evidence with respect to each of the plaintiffs' claims for damages and the mode of calculating damages for each claim.

A. *Discussion of the Damages Claimed for the Twelve Operating Stations:*

Plaintiffs' alleged damages to twelve operating service stations from January 1, 1972 through March 31, 1973 growing out of the price fixing activities of the defendant. At the beginning we note that this claim for damages is entitled "the predatory and coercive pricing" claim. This is a misnomer. It has been determined that all of the evidence presented and all of the instructions to the jury were on price fixing alone. There remains no question that the jury would not have understood this phrase to refer to price fixing. The jury was never presented, or confronted with, the subject of predatory pricing; it would have no reason to assume that phrase meant anything other than price fixing. All the evidence that they saw and heard went in to price fixing.

Our inquiry into whether a causal connection has been established regarding the price fixing claim has

been addressed previously. It is sufficient to say that there was an overabundance of evidence from which the jury could reasonably have concluded that the defendant was engaged in price fixing, and that such activity injured the plaintiffs in their operating service stations. Our sole inquiry into plaintiffs' first claim for damages, therefore, concerns the quantification of those damages.

The method of calculating damages to the twelve operating stations for the relevant period was as follows: The accountant, Caldwell, based his calculations on the daily sales records, the monthly profit and loss statements, and other records of King's gas stations. The established damages for each operating station were calculated in this manner:

The average profit margin per time shift, that is, the retail price of gasoline sold less the cost of that gasoline, was calculated for those periods of time during which the plaintiffs were selling gasoline at the desired prices (29.9 and 30.9 for regular gas; 31.9 and 32.9 for premium gas). Those margins were measured against the average margin per shift realized when plaintiffs were selling gas at other than the desired prices. The figures computed for the average margin per shift when plaintiffs were selling at prices other than the desired prices were subtracted from the figures computed for the average margin per shift when plaintiff was selling at the desired prices. The differential for each station was multiplied times the number of shifts in calculating the estimated damages from lost profits due to defendant's price fixing activities. Profits and estimated losses of

each station were compared only against the station's own actual performance. One station was not measured against any other station. Where records were incomplete, they were disregarded. No growth projections of future earnings were made. The total damages for this claim were thus estimated as follows:

Store No	*Regular*	*Premium*	*Total*
1	$ 29,820	$19,578	$ 49,398
2	9,421	5,305	14,726
3	22,350	12,918	35,268
4	33,271	15,607	48,878
5	36,555	14,903	51,458
9	4,918	5,503	10,421
10	3,610	4,141	7,751
11	6,279	8,675	14,954
12	5,307	1,300	6,607
13	17,108	2,641	19,749
14	5,851	4,531	10,382
15	757	570	1,327
Totals	$175,247	$95,672	$270,919

The sum total of damages claimed for the twelve stations was $270,919.

It is our view that this method of computing damages is reasonable. Unlike the cases relied upon by Champlin, *supra*, the evidence in this case fully supports the reliability of the figures used as a comparative basis for calculating lost profits, no speculative projected growth rates were incorporated into the calculations of lost profits, and, as previously mentioned, the evidence

fully supports the jury's verdict that defendant's price fixing activities were the cause of any damages suffered by King's operating stations during the relevant period.

As was said by this court in Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977), once there is found to be sufficient factual evidence of damages, the plaintiffs are not obligated to establish the quantum of damages "with mathematical precision so long as the extent of such damages was not left to jury speculation." 541 F.2d at 246. If the calculations upon which the loss of profits are based are estimated in any reasonable way and the underlying assumptions on which the accountant relied are not without support in the record, the calculations may be upheld as a valid means of measuring loss of profits. Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. denied*, 371 U.S. 801 (1962). *See also*, Tire Sales Corp. v. Cities Service Oil Co., 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 68 L.Ed.2d 312 (1981); Trabert and Hoeffer, v. Piaget Watch Corp., 63 3F.2d 477 (7th Cir. 1980); Woods Exploration and Producing Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir. 1975), *cert. denied*, 423 U.S. 833; Terrell v. Household Goods Carriers Bureau, 494 F.2d 16 (5th Cir. 1974); *cert. denied*, 419 U.S. 987; Lehrman v. Gulf Oil Corp., 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); Locklin v. Day Glo Color Corp., 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971); Volasca Products Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904.

In the Fifth Circuit decision in Malcolm v. Marathon Oil, 1981-1 Trade Cas. ¶63,954 (5th Cir. April 17, 1981), an independent gasoline retailer, an admitted price cutter during the period from 1965-1972, sought damages from the defendants for antitrust violations. The district court directed a verdict against the plaintiff because it found that Malcolm's evidence was insufficient on the fact of injury and the amount of damages. The Fifth Circuit reversed the opinion of the district court. It limited its review solely to the question of whether the plaintiff had presented sufficient evidence of injury in fact and the amount of damages to warrant submission of the case to the jury. The issue in *Malcolm* was predatory pricing, rather than price fixing. However, when determining whether the evidence warranted submission to the jury on the question of injury in fact, the court stated that the plaintiff had "sufficiently shown that his profit maximizing price was greater than the low market price effectively set by the conspirators in those specific cases of unnaturally low prices testified to . . . ." 1981-1 Trade Cas. at 75,946, n. 22. The court noted that by offering proof that the price was below what Malcolm, "in his business judgment, obviously believed was his profit maximizing price in the competitive market . . . [Malcolm] offered proof that he was injured by these low prices." The court went on to state that, having provided sufficient evidence of injury in fact, the question of the amount of damages should also be presented to the jury, since "the antitrust plaintiffs burden of proving the amount of damages is lighter than the burden of proving injury in fact . . . [and] it will be enough if the evidence shows the extent of the damages

as a matter of just and reasonable inference, although the result be only approximate." *Id.* at 75,947.

In *Malcolm* the plaintiff had contended that, absent collusion by the defendants, a "normal" price for gas prevailed in the gasoline market, and the plaintiffs' practice was to price approximately two cents below the "normal" price of other independents. The court held in *Malcolm* that the plaintiff could rely upon the "normal price" as a benchmark for establishing damages due to predatory pricing. We agree and hold that the plaintiff herein should be permitted to rely upon the "normal price" as a benchmark for establishing damages as a result of price fixing. To hold differently would be to preclude antitrust plaintiffs from prevailing, even when a per se violation of the Sherman Act is present, since there is no absolutely "sure" way of establishing damages in such cases. Thus, this would defeat the entire purpose of the antitrust laws.

Based on the record, then, and the foregoing authorities, it is our holding that the method of estimating damages as to plaintiffs' first claim was not erroneous.

B. *Are the Plaintiffs Entitled to Recover Damages Growing Out of the Closing of the Four Stations?*

As indicated, plaintiffs claimed damages for commissions and profits lost for four stations which allegedly were closed as a result of the defendant's price fixing activities. The four stations included one in Tulsa, one in Oklahoma City, one in Stillwater, Oklahoma, and one in Mountainburg, Arkansas. The latter station was

only closed in 1973 for a total of 5/8ths of the period in question (1972-1975). The three Oklahoma stations were closed prior to 1972, and thus were closed for the entire period in question.

Following our foregoing analysis, before discussing the method of quantifying damage, it is necessary to ask whether the evidence supports a factual assumption that the stations were closed because of the alleged activities of the defendant. As previously noted, unless the record supports a finding of such causal connection the method of quantifying damages becomes academic and irrelevant.

The record does show that Carl King gave testimony that the four stations were required to close because of lack of profitability. Sam Olson and Fred King both testified that these stations were closed because of the price disturbances caused by the price fixing activities of the defendant. The jury may have reasonably inferred from this testimony that the stations were closed because they were unprofitable, and that they were unprofitable because of the collusive activities of the defendant. Mr. Olson testified the reason the stations were closed was that King could not maintain a volume of sales at a high enough price to make money, and that the defendant's actions were responsible for this fact. Fred King testified that the stations were closed because of the depressed prices in the area, and that there was a definite correlation between the depressed market and the defendant's overall price fixing scheme. Based on the evidence, therefore, it is not to be said that there was an insufficient basis in the record in support of the

assumption that these four stations were closed because of the defendant's illegal actions. Indeed, there was no evidence in the record to indicate that the stations had closed for any other reason.

We next consider the question of whether Caldwell's methods of quantifying the damages withstands judicial examination and scrutiny. Mr. Caldwell calculated the estimated damages for loss of profits and commissions due to the closing of these four stations as follows: Three of King's operating stations, Admiral Place in Tulsa, North May in Oklahoma City, and a station in Bethany, Oklahoma (numbers 1, 4 and 5 on the list of twelve operating stations above), were chosen as comparatives, or representative stations. Mr. Caldwell used the net profits of those stations for 1972-75, as reflected in the books and records of the stations, and added to that a portion of the claim for each of those stations under the damages alleged to have been sustained by the twelve King stations in operation due to the price fixing activities of the defendant for 1972 and three months of 1973. The total of these figures was divided by four, since the damages were alleged for a period of four years, from 1972-1975. This figure was then multiplied by 3 5/8ths, to reach a profit average representative of each of the four gas stations, having an actual total closing time of 3 5/8ths of the four years. In calculating the actual profits of the three comparison stations, Mr. Caldwell acted conservatively. For example, the Admiral Place station actually operated for approximately one month only in 1975, and realized a loss, rather than a profit, of $2,746. This loss was included in (i.e.

subtracted from) the actual average profits realized by the stations for the four years. The actual figures were as follows:

	Station			
	Admiral Place	North May	Bethany	Total
1972 Actual Net Profit	$ 2,011	$ 7,472	$11,707	$ 21,190
1973 Actual Net Profit	(46)	6,161	6,875	12,990
1974 Actual Net Profit	9,554	4,027	6,373	19,954
1975 Actual Net Profit	(2,746)	2,507	5,768	5,529
Additional profits based on pricing damage claim within above year	10,539	18,496	17,527	46,562
	$19,312	$38,663	$48,250	$106,225
Four year average per station				35,408
Number of stations closed				3 5/8
Damage claim				$128,354

In addition, Caldwell separately computed the average annual commission that the individual stations paid King Enterprises for each gallon of gas purchased, in order to calculate the estimated loss of commissions to King. This figure was excluded from the prior computations, and was not used in figuring the prior claims for damages; therefore, there was no duplication of damages. The two figures were separated for clarity. The total gallons of gas sold by the three comparison stations was obtained for the years 1972-1975. Data for the Admiral Place station for 1975 was not available, and the time period in computing average gallons sold was adjusted accordingly. An average annual commission of ½ cent per gallon was multiplied by the average annual gallons per station to arrive at annual average commissions lost for each of the four stations. This

figure was multiplied by 3 5/8ths. The calculations were as follows:

	Station Admiral Place	North May	Bethany	Total
1972 Gallons	686,035	926,225	1,081,068	2,693,328
1973 Gallons	439,989	660,389	630,183	1,730,561
1974 Gallons	638,746	583,9[illegible]	753,702	1,976,412
1975 Gallons	-	960,094	881,520	1,841,614
	1,764,770	3,130,672	3,346,473	8,241,915
Months	36	48	48	132
Average gallon per month	49,021	65,222	69,718	62,439
Average per year				749,268
Commission @ ½¢ per gallon per year				$ 3,746
Times 4 years				$ 14,984
Number of stations closed				3 5/8
Damage claim				54,317

The total damages claimed for the four closed stations was, thus, $182,671 ($54,317 for loss of commissions and $128,354 for loss of profits).

The question is whether use of these three stations as comparatives for the four closed stations is reasonable. Champlin contends that there is no evidentiary basis upon which to reach the conclusion that the closed stations would have been equally as profitable as the three comparative stations. Such evidence could not be in the record, however, since there is no way of establishing "what might have been." This court has thoroughly explained the rationale to be followed in cases where it is impossible to prove the non-provable. Continental Bak-

ing Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir. 1973), *cert. denied*, 414 U.S. 975.[1]

There was evidence in the record from which the jury could have reasonably assumed that King's closure of the four stations was caused by the actions of the defendant. If the jury did so find, therefore, that the defendant's illegal activities led to the closing of the stations, the inability to prove exactly what profits the closed stations would have realized if they had not closed should not preclude the plaintiff from recovering.

Champlin's expert witness called to rebut the dam-

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[1] Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such a case, while the damages may not be determined by mere speculation or guess it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. Story Parchment Co. v. Paterson Co., 282 U.S. 555, 563, 51 St.Ct. 248, 250, 75 L.Ed. 544.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265, 66 S.Ct. 574, 580, 90 L.Ed 652.

This position was recently reaffirmed by the Supreme Court in Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). It has been otherwise stated: '. . . having thus established the factum of damages, the amount thereof may be fairly approximated by the jury.' Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir.). Also: '. . . When wrongdoers, by their very actions, make it virtually impossible to prove damages precisely, they should not be heard to complain of the method of proof, if the method allowed by the trial court is reasonable under the facts and in the circumstances of the case.' North Texas Producers Ass'n. v. Young, 308 F.2d 235, 245 (5th Cir.).
476 F.2d at 111.

age study prepared by Mr. Caldwell, Dr. Richard H. Leftwich, was permitted to testify at length that the assumption that the four closed stations would realize profits equal to the three metropolitan comparative stations, and the assumption that King could have sold at the optimum level of pricing if the stations had remained open, were economically unsound. Champlin's officers, Mr. Biggersmith and Mr. Richardson, also testified to that effect. Thus, the jury was free to believe that version of the study, if it decided to do so. Additionally, the trial court instructed that the jury was to give the expert testimony that weight which it deemed relevant and proper and decide whether the experts' opinions were sound. So the jury was specifically told to analyze this testimony of the plaintiff and the rebuttal by the defendant. There was a specific instruction as to the accounting data which stated "if you feel that these compilations or summaries do not reflect, or are in conflict with, the underlying data which has been admitted into evidence, you may disregard such compilations or summaries, to the extent that they are not supported by the evidence." The jury was thus free to accept or disregard Caldwell's damage study and to accept or disregard Leftwich's conclusion that the study was based on economically unsound assumptions. The jury, of course, resolved this matter in favor of plaintiff.

Dr. Leftwich testified that he knew of "no better way to measure damages at the moment." We have no disagreement with that statement. No better way of measuring damages has been revealed to this court, either, and thus we are disinclined to disregard the jury's

decision. True, King's least profitable stations, rather than its most profitable ones, could have been used as comparatives. However, the answer to that is that the jury had the entire picture before it and it could have taken that into account in reaching its verdict; it could have rejected damages in that amount if it so chose.

The weight and probative value of Caldwell's and Leftwich's testimony was for the jury to decide. Atlas Building Production Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960). *See also*, Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966). As stated in Trabert v. Hoeffer, Inc., *supra*, 633 F.2d at 484 ". . . in its damage assessment the 'fact finder may act on probability and inference . . . . Even though we may not agree with each step in the [fact finders] reasoning process, we must affirm . . . unless the findings are beyond the pale of sane judgment' (citation omitted)." We hold that the findings of the jury in the case at bar are not excessive. The damages awarded for plaintiffs' second claim are not clearly erroneous.

C. *Were the Plaintiffs Entitled to Claim Damages for the Six Stations That Were on the Drawing Board, So to Speak, But Were Never Opened?*

King's claim in this regard arises by virtue of the fact that it had planned to open six stations in Blackwell, Enid, Guymon, Boise City and Woodward, Oklahoma, and Liberal, Kansas, but that its plans were changed because of Champlin's illegal price fixing and

the resultant depressed market. The evidence pertaining to this claim is very weak.

Olson testified that he looked at the stations in Blackwell, Woodward and Liberal, and that he looked at the prospective station in Enid and talked with the owner and her attorney. Olson and Carl King both viewed the prospective stations in Guymon and Boise City and talked with the operators. Mr. Olson and Mr. Fred King testified that the company believed that it was unable to open these planned stations due to the depressed markets, and that the depressed market condition was due to Champlin's price fixing. However, Carl King testified that the failure to open the six planned stations was due to a lack of supply of gasoline. Mr. Olson also testified to that effect. We have noted several times that failure to supply or refusal to deal was not at issue in this case. Defendant was unable to rebut such a claim, and the issue was not presented to the jury. Therefore, damages may not be awarded in this case for failure to supply or refusal to deal.

The claim for damages due to price fixing based on King's failure to open the six allegedly planned stations is not supported by the plaintiffs' own testimony. At most, the evidence shows conflicting allegations by the plaintiffs and Mr. Olson. This evidence is certainly not sufficient to warrant an award of $302,352 in actual damages, or $907,056 after trebling. We hold, therefore, that this portion of the decision below must be reversed. The jury's award of $755,952 must be reduced in the amount of $302,352, the amount awarded for the six

planned stations that never opened, to reduce the total amount of the actual damage award to $453,590. Trebling that amount pursuant to 15 U.S.C. § 15 reduces the total damage award to $1,360,770, rather than $2,267,826 as awarded below.

D. *Refusal of the Court to Accept in Evidence the Depositions of Carl King, Sam Olson and Dea Entriken as Substantive Evidence to Their Testimony Notwithstanding that All Three Were Present and Testified at the Trial*

The defendant sought to read the depositions of the three above named persons in their entirety during the trial. The trial court refused to permit this.

Rule 32 (a)(2) of the Federal Rules of Civil Procedure provides that a deposition of a party or his managing agent may be used by an adverse party for any purpose. This rule applies to the depositions of the plaintiff, Carl King, and his managing agent, Sam Olson. As to Entriken, it does not have the same application. While Entriken has been named as a third party defendant by the defendant-appellant, that does not make him a party in the case on appeal here.

The fact that Entriken was not a party at the time his deposition was taken does not render the rule inapplicable to Entriken, however. Rule 32 specifies that insofar as the rule applies to agents, the agent must have been an agent at the time the deposition was taken.

The Rule does not state that the party must have been a party at the time his deposition was taken. The policy reasons for requiring that an agent must have been an agent at the time his deposition was taken are cited in 4A, J. Moore's Federal Practice, § 32.4, p. 32-18 (1981) as follows: 1) If the agent had ceased to be an agent of the party at the time of the deposition, he may have been hostile toward the party at that time, and thus it would be unfair to allow his testimony to be used as an admission against the party; and 2) at the time of the deposition the non-agent did not represent the party, and thus could not bind the party. These policy reasons do not apply to a party, however, and thus the fact that Entriken was not a party at the time his deposition was taken is irrelevant.

As far as Mr. Entriken's deposition is concerned, Rule 32 is not relevant as far as this appeal is concerned, since Entriken was not a party in the case between Champlin and King but only in the case between Champlin and Entriken. Thus, the failure to permit the deposition to be used as an admission of Entriken is not relevant to this appeal. Since the case between Champlin and Entriken is not on appeal here, the failure of the trial court to allow unrestricted use of Entriken's deposition is irrelevant to this appeal, and could not constitute reversible error in order to reverse the case between Champlin and King.

We are faced with a different problem, however, in connection with the depositions of Carl King and

Sam Olson. Under Rule 32 a party may introduce "as a part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there. . . . [T]he Rule is a restatement of the long recognized rule of evidence that statements of a party which are inconsistent with his claim in litigation are substantively admissible against him." Community Counseling Service, Inc. v. Reilly, 317 F.2d 239, 243 (4th Cir. 1963). *See also,* Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978); Zimmerman v. Safeway Stores, Inc., 410 F.2d 1041 (D.C.Cir. 1969). However, the situation in the case at bar was not as open and shut as the appellee would like to have it.

We are not denying that the trial court excluded the depositions as a whole as admissions. He did, and this was not expressly in accordance with the Rule. However, in line with our statement a moment ago, the Rule is not open and shut in practice. The trial court has a perfect right to limit the use of the material if it is repetitious or immaterial (*See* Fey v. Walston and Co., Inc., 493 F.2d 1036 (7th Cir. 1974)), or where the depositions do not add any information to that given in oral testimony by the deponents or the information is irrelevant. Fenstermacher v. Philadelphia National Bank, 493 F.2d 333 (3rd Cir. 1974); Pursche v. Atlas Scraper and Engineer Co., 300 F.2d 467 (9th Cir. 1962), *cert.*

denied, 371 U.S. 911.[2] A further limitation is the dis-

[2] The Pursche case is an authority which is cited by the defendant-appellant in its opening brief supporting its contention that the trial court erred in excluding depositions of Mr. King and his manager, Mr. Sam Olson. It is quite true that the United States Court of Appeals for the Ninth Circuit stated the general rule. The court did not reverse the case on that ground, however, and the language of the court is significant because it is fully applicable here. The Ninth Circuit said:

> We do not mean to sanction the practice of indiscriminately offering an entire deposition or encourage any attempt to thus impose upon the court. In Merchants Motor Freight v. Downing, supra, the court stated the deposition of a party might be admitted 'subject to the court's right to exclude such parts thereof as might be unnecessarily repetitious in relation to the witness' testimony on the stand.' No doubt that procedure has merit but we believe as a general rule the better practice is for the court in the first instance to require counsel to specify the particular portions that are deemed relevant and to limit the offer accordingly. Cf. United States v. United Shoe Machinery Corp., 93 F.Supp. 190 (D.C.D. Mass. 1950).
>
> But the record does not demonstrate that the error was prejudicial. On three occasions Atlas examined Pursche as an adverse party pursuant to Rule 43(b); the examination covered many matters involved in the action and was not limited by the court; the last of Pursche's appearances followed Atlas' unsuccessful attempt to introduce his depositions. Atlas then interrogated Pursche, covering various matters appearing in the deposition and his testimony concerning them, and at no time did Atlas offer to prove that Pursche's testimony at the trial fell short of any appearing in the depositions. 28 U.S.C.A. § 2111; McKee v. Jamestown Baking Co., 198 F.2d 551 (3rd Cir. 1952); Watts v. Holland, 153 F.2d 337 (9th Cir. 1946); Davis v. R.K.O. Radio Pictures, 191 F.2d 901 (8th Cir. 1951).

300 F.2d at 488.

It should be said, thus, that the Ninth Circuit was very careful to point out that the trial judge has discretion with respect to acceptance of such depositions. If it were a short deposition that contained a clear cut admission, it would be plain error, no doubt, to refuse to accept it because its relevancy would be apparent. In the case at bar, however, counsel just wished to offer the depositions lock, stock and barrel, which is one other reason justifying the failure to accept them. In any event there is a good deal of justification for rejecting the tender inasmuch as there was no way for the court to know, without the aid of counsel, which parts were material or useful. Thus, this matter should be resolved in the case at bar the same way it was resolved in Pursche.

cretion of the court; the handling of depositions is peculiarly vested in the discretion of the trial court. Reeg v. Shaughnessy, 570 F.2d 309 (10th Cir. 1978); Sims Consolidated, Ltd. v. Irrigation Power Equipment, Inc., 518 F.2d 413 (10th Cir. 1975), *cert. denied*, 423 U.S. 913; Campbell v. Burnett, 351 F.2d 342 (10th Cir. 1965). As stated in Reeg, *supra*, "[o]bjections to receipt in evidence of depositional testimony, in whole or in part, may be made at trial for any reason which would require the exclusion of the evidence if the witness were present and testifying at trial." 570 F.2d at 316-17.

Undoubtedly the trial court erred in flatly ruling that the depositions of the parties could not be used as testimony. However, in addressing this question we note that the counsel for appellee did not select only portions of the depositions which he regarded as being admissions. He simply tendered the depositions in one bundle, and they run on and on. Certainly those portions that were repetitious or irrelevant could be excluded. As to those portions of the depositions which were not repetitious or irrelevant, it is impossible to see that any substantive rights of Champlin were affected by the court's refusal to allow these to be read, so that the jury's decision or verdict in this three and one-half week trial should be reversed. Champlin could easily have questioned Olson and Carl King in the matters it wished to introduce, for example, and asked them whether they had made all these statements. But no such effort was made.

Champlin specifically objects to the court's refusal

to permit the deposition of Olson to be read into evidence for the purpose of showing the invalidity of statements made during that deposition. However, Champlin could have questioned Olson on this matter and then used Olson's deposition for impeachment purposes inasmuch as the trial court expressly stated that it would permit those depositions to be used for such purposes. We fail to see why this court should reverse a decision in favor of Champlin's opponents merely because Champlin insists that it should have been allowed to utilize its own method of getting its point across, when another, at least equally effective method of getting that same point across was easily available.

Turning now to Champlin's claims of error having to do with the refusal of the trial court to admit other testimony in evidence, we find no merit whatsoever to any of Champlin's contentions. Many of Champlin's allegations of error go to evidence it wished to present in order to rebut claims of predatory pricing or refusal to deal, which were irrelevant to the issue at trial. There are some contentions that were raised by Champlin which deserve mention. These are:

First, Champlin maintains that error was committed by the trial court in failing to allow it to present evidence to prove its economic incapacity to rig the market. However, since market power is not relevant to a price fixing case under § 1 of the Sherman Act, the trial court did not err in refusing to admit such evidence. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 76 S.Ct. 937 (1956); United States v. Socony Vacuum Oil Co., *supra*, 310 U.S. at 224, n. 59.

Second, Champlin alleges that it was erroneously prevented by the trial court from refuting King's allegations of causation between Champlin's illegal activities and King's inability to sell at its optimum price. We will address the two major contentions individually:

1) Jeff Smythe prepared an exhibit which attempted to show that King did not reduce prices to meet Champlin's prices, but that King reduced its prices below Champlin's prices. This exhibit prepared by Smythe, however, did not state the prices which Champlin's dealers were charging. That exhibit merely stated the prices that Champlin supposedly recommended to its dealers. The exhibit did not state what the actual sales prices were at the Champlin stations. Hence the trial court held that the comparative study failed to show what it purported to show and was thus misleading. The exhibit was actually comparing actual prices of King against theoretical or recommended prices of the Champlin dealers. Inasmuch as the Champlin dealers were shown to have been free to charge any price without following the recommended price, the court felt the exhibit was prejudicial and misleading. The court instructed defense attorneys that they were free to submit the exhibit in another form (i.e. si that the exhibit stated, without being misleading, what it was actually comparing.) This, however, the defense lawyers refused to do.

The court did not abuse its discretion in refusing to admit the exhibit since it was misleading, especially since the court told defense counsel that it was free to present the exhibit in another, non-misleading form.

2) Sam Olson kept a diary recording price changes at the King stations and the reasons therefor. Defense witness Mickey Bowles prepared two exhibits which involved an analysis of that diary and purported to demonstrate that King only rarely reduced its prices to meet prices set by Champlin. The exhibits were objected to by plaintiff's counsel on the grounds that they only covered nine months of the forty month damage period, and as such were merely cumulative since the entire Olson diary had been admitted into evidence, and that the documents could only compare actual prices charged by King with prices recommended by Champlin, since Mr. Bowles had already testified there were no records indicating actual selling prices of Champlin dealers. The objection was sustained.

We agree that the trial court acted within its discretion in refusing to admit these exhibits. Moreover, since the entire Olson diary, containing the same information, had been admitted into evidence, we fail to see how the exclusion was prejudicial to the defendant.

Third, Champlin maintains that the majority of King's claims were for damages for injuries suffered when Champlin had caused prices of gas to be lower than normal, whereas Entriken's testimony of price fixing went to efforts of Champlin to raise the prices of gas. King, however, alleged a complete scheme on the part of Champlin and its co-conspirators to fix prices. The issue was not purely a matter of lowering or increasing prices. The scheme involved both, first lowering the prices and later raising the prices in order to keep King

off-balance and to prevent him from charging optimum prices for gas. While the direct evidence of price fixing went to the raising of prices, the circumstantial evidence was more than sufficient to raise the inference that the price fixing conspiracy involved the entire scheme. Champlin was, of course, free to present to the jury, by proper trial techniques, its theory that King had not suffered any damages by virtue of Champlin's efforts to fix prices.

Champlin states in its brief that it was precluded from reading Champlin's deposition testimony to the effect that the elimination of depressed prices would help, rather than hurt, King. All this testimony was not excluded. King was asked questions on the very topic at trial. He answered those questions and parts of his deposition were read at trial.

Finally, Champlin maintains that the trial court erred in refusing to allow it to question witnesses as to the truthfulness of another witness' testimony. The trial court indicated that in the interests of time it would be preferable for Champlin to question the witnesses on the subject matter itself, and then point out the contradictions. Champlin could have done this, or, in the alternative, could have merely rephrased the questions presented to the witnesses rather than ask them if, when such and such a witness said so and so, was that witness lying? We fail to see that Champlin's substantive rights were prejudiced by the trial court's refusal to allow him to ask questions in that form.

Our conclusion is that Champlin's claims of error

due to the use of depositions and other evidence do not constitute grounds for reversal.

The judgment of the district court is, therefore, affirmed in part, and reversed in part. The $2,267,826 treble damages award is reduced to $1,360,770.

APPENDIX B

JULY TERM — September 14, 1981

Before Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges

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No. 80-1630

KING & KING ENTERPRISES, d/b/a KING GAS & OIL: and CARL R. KING, d/b/a KING GAS & OIL

Plaintiffs-Appellees,

vs.

CHAMPLIN PETROLEUM COMPANY,

Defendant-Appellant,

FRED DEA ENTRIKEN,

Third Party Defendant-Appellee,

DEWEY MASON and MICKEY BOWLES,

Fourth Party Defendants.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Judge Holloway did not participate.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

SEPTEMBER TERM — October 15, 1981

Before Honorable Oliver Seth, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

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No. 80-1630

(D.C. No. 75-276-C)

KING & KING ENTERPRISES, d/b/a KING GAS & OIL; and CARL R. KING, d/b/a KING GAS & OIL,

Plaintiffs-Appellees,

vs.

CHAMPLIN PETROLEUM COMPANY,

Defendant-Appellant,

FRED DEA ENTRIKEN,

Third Party Defendant-Appellee,

DEWEY MASON and MICKEY BOWLES,

Fourth Party Defendants.

This matter comes on for consideration of:

1. The motion of Champlin Petroleum Company, asking the Court to recall the mandate issued in the captioned appeal on September 22, 1981, and to stay the reissuance pending application for certiorari.

2. The motion of appellees to recall the mandate for amendment pursuant to Rule 37, Federal Rules of Appellate Procedure, to allow interest on the reduced judgment at the rate of 12% from the date of the original judgment and on the lower court's judgment to appellees for attorneys' fees, in accord with applicable law.

Upon consideration whereof, it is ordered:

1. The mandate issued to the United States District Court for the Eastern District of Oklahoma on September 22, 1981, is hereby recalled.

2. The judgment entered in the captioned cause on August 3, 1981, is amended, in pertinent part, to read as follows:

> "Upon consideration whereof, it is ordered that the judgment of that court is affirmed in part and reversed in part. The cause is remanded to the United States District Court for the Eastern District of Oklahoma with instructions to reduce the treble damages awarded to $1,360,770.00. That Court, pursuant to the provisions of Rule 37, Federal Rules of Appellate Procedure, shall allow interest on the reduced judgment from the date of the original judgment and on the lower court's judgment to appellees for attorneys' fees and on the statement of costs issued on September 22, 1981, in the sum of $1,924.49, all in accordance with applicable law."

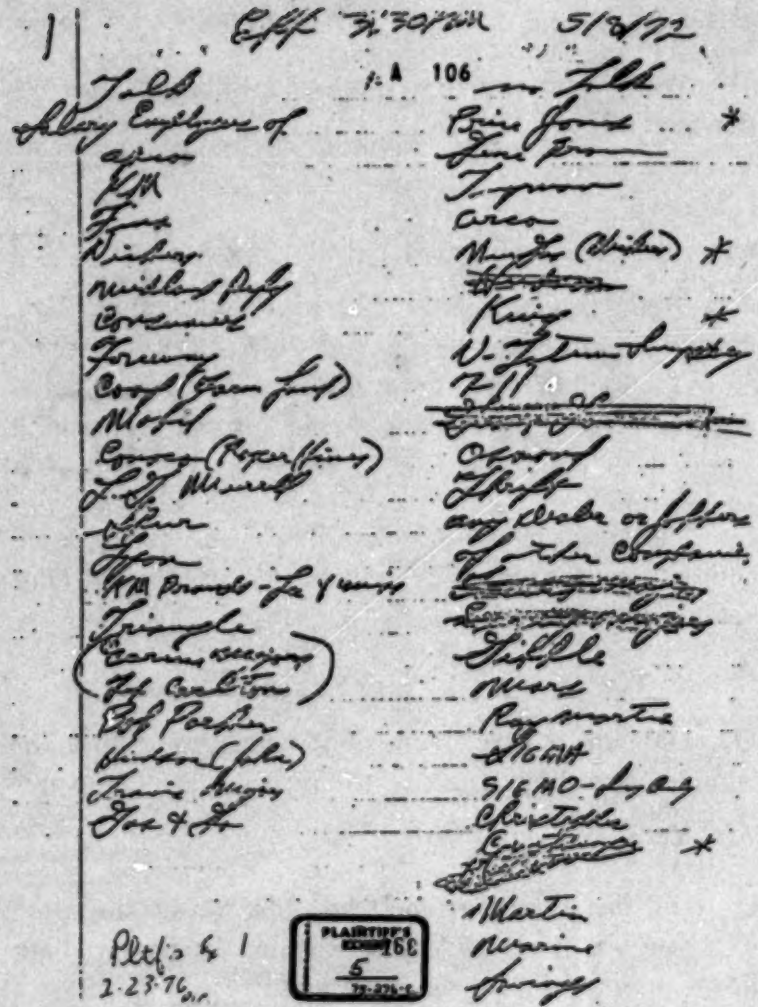
3. Reissuance of the mandate is stayed until November 16, 1981. If, on or before that date, there is

filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that a party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition of the Supreme Court.

4. This order is conditioned upon the continuance in full force and effect of the supersedeas bond filed with the Clerk of the United States District Court for the Eastern District of Oklahoma in the amount of $3,-500,000 until the Supreme Court has finally disposed of the certiorari petition.

HOWARD K. PHILLIPS, Clerk

APPENDIX D



Q. Would you, Mr. Entriken, read Paragraph 3, please?

A. Number 3? Number 3 is to satisfy ourselves that all efforts toward market improvement have been made as far as possible and that our information is reliable.

Q. Was that a written policy of Champlin as you understood it?

A. Yes.

Q. And what did you understand that to mean?

A. Well, as Champlin preferred to market gasoline, market improvement was a high price, therefore these efforts toward market improvement to be made as far as possible were efforts made to obtain a high price, as high a price as possible.

Q. Did you consider, Mr. Entriken, your calls to competitors about future price moves to be an effort at market improvement?

A. Yes.

Q. Did you believe, then, your telephone calls to be within that written directive to you from the company?

A. Yes.

Q. Did there come a time when Mr. Mason discussed with you who you would talk with on the phone about future prices and who you could not?

A. Yes.

Q. And did that conversation between yourself and

Mr. Mason result in the creation of any document indicating who you should or should not talk with?

A. Yes.

Q. I will show you Plaintiff's Exhibit 5 and ask if you can identify that, please?

A. Yes.

Q. What is it?

A. It is a list of marketers, competitors of Champlin, along one side a row under the heading Talk; along the other side under the heading No Talk.

Q. Who created the document?

A. Mr. Mason. It is his writing, but this was created in conjunction with my knowledge of these marketers, Mr. Bowles' knowledge of these marketers, the knowledge that we had — well, from certain other activities.

Q. Did the two of you work together then in creating the document, you and Mr. Mason?

A. Yes. I had a part in it. Yes, I have played in the creation of it.

Q. Once the document was drafted by Mr. Mason, did he provide you with a copy?

A. Yes.

Q. Did you understand you were to utilize the information on that as part of your duties?

A. Yes.

Q. Did you in fact utilize it as part of your duties?

A. Yes.

MR. GIAUQUE: We offer Plaintiff's Exhibit Number 5.

MR. MUNN: Your Honor, we have no objection if they would produce the original over this document. But I would like to have it. They have it.

MR. GIAUQUE: We do not have the original of that document.

THE COURT: Mr. Giauque, we have the original counsel of P6.

MR. MUNN: Well, we object to the document until the original is produced.

THE COURT: Come up lets talk about it.
(AT THE BENCH)

A. Yes.

Q. And was anyone else other than yourself or Mr. Mason involved in the preparation of this document?

A. Yes.

Q. Mr. Henkel?

A. Well, I can't be sure about Ken Henkel. I said that I believe that it's possible that Ken Henkel had some ideas regarding certain people that we could talk to, we might need to talk to, but Mickey Bowles I'm positive.

Q. And does your handwriting appear anywhere on the document?

A. No.

Q. Can you identify the person's handwriting who drafted this?

A. Yes.

Q. Who is that?

A. Dewey Mason.

Q. All of it?

A. Yes.

Q. Now, would you tell us, please, why the document was prepared as you understood it?

A. Well, on about this time, prior to this time May, of '72, the various lawsuits as I understood it, various lawsuits, one in particular, this one in particular by a man named Price Jones had been filed against Major or

Branded Independence. Champlin was — oil company supplies of gasoline and for that reason a moratorium — we were on — on calling of these people on fixing prices was being called and this document reflex that. We could talk to certain people down to the talk side. They were considered to be people who would remain confidential, would hold these matters in confidence. These other people on the no talk side were considered to be, the opinion of Mr. Mason and that of Mr. Bowles and myself at least, we three that these people may not be as discreet about the matters that we were talking about.

Q. What is the first name under the no top column?

A. Price Jones.

Q. There is an asterik by Price Jones' name. There is an asterik by another name. I believe four of them on the no talk. Would you tell us who those are?

A. Yes. Price Jones, New Gas then after new gas which is a brand (Vickers) Apparently they were soon to be his supplier. That's the second one. King Oil Company and Curtsinger which is Curt Oil Company.

Q. Now, let me ask this. Where does Price Jones operate or where did he operate at that time, '69 through '73?

A. At that time he operated in various areas, marketed in various areas but Oklahoma City was his base of operation.

Q. Was he an independent?

A. Yes. He may have been affiliated with the Brand, I'm not

Q. Then I says something else, maybe you can read that for us. What I want to call your attention to, is what appears to be an asterik by U-Totem.

A. Yes, there is.

Q. What was U-Totem price policy as you observed it?

A. Well, they marketed instructure situations which if the price were up they would market at the same price, street price as someone such as King. They weren't as agressive on downward movement as — you did ask about King?

Q. Yes. I asked about King.

A. U-Totem was not as agressive as King in moving the price downward. Often times most of the time they were not — were not — it just simply didn't pay that much attention, as much attention to their gasoline business.

Q. What was the marketing policy of Curtsinger as you observed it?

A. Marketing policy?

Q. Well, all I am trying to find out is whether they were in the same category as Price Jones, or King as aggressive marketers as you described?

A. Yes, Curtsinger was aggressive.

Q. With respect to these five, then, that are under the "no talk" with an asterisk, Price Jones, Nu-Gas, King, U-Tote-M, and Curtsinger, do they all have something in common, Mr. Entriken?

A. Yes.

Q. What is that?

A. It is my understanding, and I say this only because I cannot be positive about Nu-Gas, they may have had some kind of price support from Vickers, I just don't know, I can't know about these, everyone's agreement with their supplier. But, in the case of Price Jones, King, and Curtsinger, and probably Nu-Gas, they were independents, they did not have refineries, they didn't have production, they bought from refineries, from major brands, from whoever they could buy from. They had this in common. Their pricing policies, Nu-Gas, was more cooperative in price restoration attempts than — well, than King and Curtsinger definitely, Price Jones,

they were more cooperative. Ray Cummins ran Nu-Gas and they were cooperative. But, the others in common, they were — it was difficult to get them to move their price along with the rest of the people at the desired time.

Q. Who singled these five out and put an asterisk by their name on the "no talk"?

A. Mr. Mason.

Q. Did he tell you why he had put an asterisk by those five?

A. They were definitely no talks.

Q. Now, on the talk side, would you read the companies listed there?

A. Yes. APCO, KM, which is Kerr McGee, Fina, Vickers, Midland Refining, which was a supplier, refiner for the brand Co-op, but Midland Refining, Consumers, Freeway, then Co-op, Farmland, Farmland Industries, Mobile, Conoco, and in parentheses after Conoco is Roger Hines, an employee, L. G. Murrow.

Q. Who is Mr. Murrow?

A. He was a broker of unbranded gasoline, to the best of my knowledge.

Q. All right. Go on, please.

A. Well, Spur, Lyon, KM Brands-La Gloria, Triangle, Ernie Majors, Tex Carlton, Bob Parker, Hudson, then in parentheses John, John Whittaker, Gus Hudson's son-in-

law, didn't have support, weren't involved in support programs at all?

A. Yes.

Q. And are there companies or individuals that you were not to talk to that were involved in support programs?

A. Yes.

Q. Were you ever told by Mr. Mason that this talk or no talk document had anything to do with calling about support information?

A. No. There may have been an instance, or a few, even, I doubt it, when we would call a dealer or a jobber to verify what level price support they had. However, we usually didn't base our — the price support that we would put in on what this dealer or jobber told us.

Q. Were there times —

A. We based it on what the company man told us.

Q. Were there times, Mr. Entriken, where you would call some competitor or representative of a competitor to discuss whether he was getting price support and in that discussion also discuss with him future price moves?

A. Yes.

Q. How often did that occur?

A. Frequently, very often.

Q. Was the purpose for this document, this talk and no talk document, as I understood it, principally one

having to do with the future price moves?

A. Yes.

Q. And not one principally dealing with price supports?

A. No.

Q. Was there ever any discussion between you and Mr. Mason as to whether some of the people on this list were more trustworthy than others with respect to future pricing information?

A. Yes.

Q. What did he tell you in that regard?

A. Well, when we drafted this, I have stated that certain people on the talk side, such as L. G. Murrow is an unbranded jobber, so this is who we are not supposed to talk to anymore, no longer for a period of time, anyway, we are not going to talk to these unbrands, these individuals, the renegades. So, this list was prepared and I could see this is going to hinder us. Well, here is a man L. G. Murrow, there was no activity from his company, I don't know who he sold to, he was a broker, I don't know who he sold, bought and sold from, but I never fixed prices with L. G. Murrow. He called in, he was a nice man, this was a casual thing, but I did mention why is L. G. Murrow on this side, I recall that. "You mean we can still talk to L. G?" I was sort of — I believe he was a DX broker, for DX. But, discussions such as this.

MR. GIAUQUE: We would now request counsel read the material following this beginning on Page 128, line 3 to the bottom of Page 129 please.

THE COURT: Excuse me just a second. Let me read it.

Q. Continuing in answer to Mr. Perry's question —

THE COURT: Just a second. Let me read this, that he ask be read.

MR. MUNN: All right.

THE COURT: To see whether or not we'll read it or you'll read it. Your request will be denied. Go ahead sir.

MR. MUNN: Do not read it?
THE COURT: That's right.

Q. All right, sir. I believe you testified that Mr. King was what you called a price cutter, is that right?

A. Yes, we knew him in the industry as that.

Q. I think you described that very vividly if I recall that King's general reputation and policy was the first one down and the last one up. Do I recall that correctly?

A. Yes, sir. That was — yes.

Q. And Champlin was just the opposite, Champlin wanted to be the last one down and the first one up, is that right?

A. That's — all of our — a lot of our customers it

would be advisable not to talk to, do you recall that?

A. Yes, sir.

Q. King was in the no talk column. Do you know why?

A. Yes.

Q. Why?

A. We considered King among those, and others, certain others, to be a price cutter, the characterization was as a — he was a price cutter, they were not — I could say trustworthy, we could not count on them for certain regarding conversations. This is what I was told.

Q. Anything else, were you told anything else?

A. Yes, numerous reasons.

Q. What other reasons?

A. For King and all — they do not always cooperate in market restorations as certain others did who were on the talk side, may have been. Numerous reasons such as this.

Q. Any others?

A. They were not our competition, they were not deemed by us to be competition, even though, yes, they obviously were competitive in the market, but we did not base price support upon their activities.

Q. Was that the substance of what you were told as to why they were on the talk-no talk side?

A. To the best of my recollection right now those few

A. I recall that. I don't recall giving the testimony, I do recall now that that's refreshed by memory. I recall those instances. There are some misspellings, the name, Murray Hudson.

Q. The person in the group that you and Mr. Mason and Mr. Bowles felt it was prudent to talk with after this Price-Jones lawsuit were people you considered reliable and your superiors considered reliable, were they not?

A. Yes.

Q. Was Champlin's marketing philosophy during the time you were in the Tulsa office to try to sell its gasoline at as high a price possible?

A. Yes.

Q. Champlin didn't engage in price wars to keep prices down but rather Champlin wanted prices up, did it not?

A. We did, for the most part. I have mentioned specifics when we did reduce prices for reasons other than meeting competition.

Q. Pine Bluff example?

A. That was one, yes.

Q. Do you know of any prolonged price wars that Champlin engaged in in Oklahoma, Texas or Arkansas with the intent of keeping its price down?

A. Not prolonged. No, I don't.

Q. You don't claim, do you, Mr. Entriken, that you have

A. Yes, it is.

Q. Whose handwriting is it, do you know?

A. Dewey Masons.

Q. Did Mr. Mason hand this to you?

A. He gave me a copy.

Q. Did Mr. Dewey Mason write every name on the no talk and talk list?

A. Yes. This all is his writing.

Q. Did Mr. Dewey Mason tell you you were to use this list, Plaintiff's Exhibit 5 while you were working as his assistant?

A. Yes.

Q. He gave it to you to use while you were working for Champlin?

A. Correct.

Q. During normal working hours?

A. That's correct, yes.

Q. All of the conversations you testified to here for the past four days resulting from Plaintiff's Exhibit 5, were they done in your office either at Charles Page or on Yale?

MR. MUNN: Your Honor, I must for the record, object to the predicate of Mr. Zarbono in his question. The form is objectionable.

THE COURT: Overruled. You may answer.

A. What was the question? Could you read it back?

MR. ZARBONO: Please read the question back.

(QUESTION READ)

THE WITNESS: Yes, they were.

Q. Were these calls made during normal working hours?

A. Often times they weren't. What are normal working hours? Eight to Five? Sometimes before eight and sometimes seven o'clock at night.

Q. Were they your normal working hours?

A. Those were normal for me, yes.

Q. Mr. Entriken, did you testify that Mr. Mickey Bowles had some input into Plaintiff's Exhibit Number 5?

A. Yes.

Q. Could you please —

A. It's my understanding.

Q. Could you please identify such input by Mickey Bowles?

A. I know that Mr. Mason asked him about various of these people, whether or not they would be all right to talk to, all right to talk to them. That's why certain appear on the talk side.

Q. To your knowledge who did Mickey Bowles say it was okay to talk to?

A. L. G. Murrow for one. Well, this would be his say. Mr. Mason — L. G. Murrow is on the talk side. He was an unbranded broker of gasoline. He should have been on the

called your supplier —

MR. MUNN: We'll object to that conclusion on the part of the counsel.

THE COURT: That's right.

MR. GIAUQUE. I'll rephrase it.

Q. Did you, after Dewey Mason called you, and after Mr. Rhyner called you, have a belief as to whether Mr. Mason had called Rhyner?

A. Yes.

Q. Now, after that occasion you went up with your prices, I believe you said.

A. Yes, sir.

Q. Did you ever, when someone told you about a price move up in the future, and ask for your agreement, did you ever balk again?

A. Not that I recall.

Q. Did there come a time when Dea Entriken told you that someone in Champlin had advised him that he couldn't call you anymore?

A. Yes, sir.

Q. Did Mr. Entriken continue to call you after that period of time?

A. Sometimes he would after work, but never during working hours.

Q. On how many occasions during the '69 to '73 period

CHAMPLIN CO.

INTER-OFFICE CORRESPONDENCE

TO: Ken Richardson Office: Tulsa

FROM: Dewey Mason Date: Dec. 21, 1972

SUBJECT: Personal Objectives and Action Plan for 1973

Attached is a list of nineteen items that I will use as my personal objectives and action plan for 1973. I am also attaching a report from Dea Entriken in which he lists his action plan for the same period of time.

This action plan will be performed by the Pricing Department with each and every customer and all personnel in the Tulsa Region, along with the Manager - Product Pricing in Fort Worth.

The end result of this list of personal objectives and action plan should be an excellent working relationship with the Tulsa Region and Headquarter personnel, along with a completely satisfactory working relationship with all accounts, whether they are commission dealers, distributors, consignees, or lube oil and grease distributors. This action should be accomplished during the first thirty days of the year and the results and profit improvements should be realized immediately, depending on the market situation throughout the Tulsa Region.

If you have any questions about the attached personal objectives and action plans for the Tulsa Region Pricing

Department, I will be more than happy to discuss them with you.

Yours truly,

Dewey Mason

Regional Manager - Product Pricing

PERSONAL OBJECTIVES AND ACTION PLAN FOR REGIONAL PRICING SECTION, 1973

1. To realize the highest profit realization through all channels of distribution of product without any significant loss of gallonage.

2. Keep close check on projected product realization by type of distribution against actual product realization from the monthly realization report.

3. If product picture improves, continue the D-C bid program. Also the bid program through distributor and consignee operations, always keeping in mind the company netback at the supply point.

4. Press for pricing authority in the regional office to cut down on delay in notifying the customer of effective date of price protection, and the commission dealer of a reduction in recommended retail.

5. Check and evaluate all new markets and make recommendations to the Regional Manager when the Division Managers request new market information.

6. Continue to strive and make recommendations for better and more effective ways of reporting and keeping records. Keep constantly aware of the company profit picture.

7. Keep in constant contact with personnel under my supervision to see that the company policy, procedures, record keeping, and systems are being followed.

8. Keep customer complaints to a bare minimum. (In the pricing section of the region there will always be complaints, but the ones we receive should be handled immediately and with the upmost tact, not allowing the complaint to fester in the particular customer's mind.)

9. Work constantly with the District Sales Representatives and Division Managers in the Tulsa Region so that they fully understand the Pricing Department expectations, procedures, policies, and goals.

10. Continue to emphasize the monitoring of CPAs older than thirty days (keeping this procedure on an automatic and continuous process).

11. Continue meeting, and holding training sessions, with new employees to make them aware of company policy and procedures and the working and reporting aspect of the Regional Pricing Department.

12. Be constantly aware of changes in the pricing policies of the oil industry.

13. Assist the Regional Manager and Operations Manager in any normal or special project that they need help with.

14. Work constantly with the Regional Manager of Marketing and Manager of Product Pricing and keep them informed of market conditions in the Tulsa Region daily.

15. Keep all accounts and regional personnel informed of any changes pertaining to policy in pricing and reporting in the Tulsa Region.

16. Avoid any known violation of TLP (Term Limit Pricing).

17. Avoid any legal entanglement as much as possible.

18. Continue to screen monthly Purchase — Claims Report and request audits if this report indicates any flagrant abuse of our CPA program.

19. Screen monthly Sales Analysis for no or low profit accounts and control establishing of CPAs.

A. Yes.

Q. And did he append a copy of yours to his when he responded to Mr. Richardson on P13?

A. I presume so.

MR. GIAUQUE: All right. We would offer at this time Exhibits 12, 13 and 14.

THE COURT: Mr. Munn, have you seen them and do you have any objection?

MR. MUNN: I hve seen them, I do not have any objection.

THE COURT: Plaintiff's Exhibits 12, 13 and 14 are admitted without objection.

Q. Now, in Exhibit 13, Mr. Mason's action plan for 1973, Number 12 on his list of action plan and personal objectives is to "constantly be aware of changes in the pricing policies of the oil industry."

And Number 17 in his plan is to "avoid any legal entanglement as much as possible."

Did you review those documents, or that document when Mr. Mason gave you a copy?

A. Yes.

Q. And in your action plan you say the following are components of my action plan, "stay informed of market conditions and trends and the overall scope of petroleum distribution which may be of assistance in performing my

talking to, I was walking out the door, and I said, made some reference to who, regarding the person I was talking to, and I said, "Well, they are going up." And he said, "Well, that's great, but you are going to get us all behind bars." And then he said, quote, you are going to have us all behind bars.

Q. Was that near the end of your tenure with Champlin?

A. Yes — no. As a matter of fact, we were on Charles Page, so the dates of the move, at this time I don't recall the dates of the move from Charles Page over to our South Yale office, I know that that happened on Charles Page, so in the end of my tenure we were on South Yale, so probably wouldn't have been. It was said in a joking, I took it to be, manner.

Q. Mr. Entriken, did Dewey Mason at any time suggest to you that you should not keep records of what you were doing?

A. Could you —

Q. Did Dewey Mason suggest to you that you should not keep, or have available records of what you were doing?

A. Quite to the contrary, he wanted me to keep records.

Q. Did he ever suggest what you might do with those records if anyone was asking questions?

A. Get rid of them.

Q. He did tell you that?

out of pocket expenses are?

A. No.

Q. And has your counsel been constantly advised as to what those are?

A. Yes.

Q. Mr. Entriken, would you tell the jury please why, if you have no financial interest in the outcome of this suit, why you have been willing to come forth and testify as you have?

A. Well, as I said earlier, when Sam Olson came to see me in '75, I had been to see Champlin, Champlin's attorney. Since then I have seen a lot of attorneys. When Sam came to see me, I assumed possibly incorrectly, that Champlin had no interests in a matter such as this, whether it affected them or not, but I really didn't care whether they had an interest or not. I really didn't care whether King had an interest. He asked if I would tell the truth about what I did while I worked at Champlin. I told him that I would without hesitation as I mentioned earlier. I would have had — I had two choices, I could tell the truth, or I could evade the truth or lie about it. Why should I? I have no reason. I think that these people, you people, everyone — these are the type things that people should know about. These were undercover things. I wasn't trying to uncover anything, or I would have done something about it between

legal pad and a telephone directory and said in effect, go out and stabilize the market for petroleum products throughout the mid-continet part of the United States?

MR. GIAUQUE: I object to the form.

A. That is correct.

THE COURT: Objection overruled.

THE WITNESS: That is incorrect because of the fact that as I have stated when I first went to work for Champlin I was Administrative Assistant to the Operations Manager in Tulsa. We had very little to do with market restoration which we have talked about.

Q. No, I'm referring to the time —

A. You said when I first went to work.

Q. I beg your pardon. I'm referring to the time you first came to Tulsa on the two week stint and worked in Mr. Mason's office. Is that what happened?

A. I'm not testifying — did not intend to imply that I, by myself, or Mr. Mason by himself, or Mr. Bowles by himself, Mr. Wright —

Q. I'm asking you about you.

A. Any of these people were by themselves expecting to go stabilize the prices. This is what we did together, yes.

Q. Is it your testimony that your persuasiveness enabled you to enter into agreements which you now say were undercover price fixing agreements with the following companies,

Texaco, Mobil, Shell, Standard Oil, Phillips Petroleum, Continental Oil, Vickers, Consumers, Kerr-McGee, Sun Oil, Premier, Fina, DX, APCO, Bell, Gulf, Derby, Farmland, Exxon, Lion, Williams, Gibble, King, Gas 'N Go, Gas Mart, JOCO, Deep Rock, Sinclair and other independents and jobbers and service stations and dealers?

A. What's the question, please?

Q. Is your testimony that you confided in and conspired with those companies and —

A. No, not all of those.

Q. Which ones do you say you did not talk to about future prices?

A. Of the list you mentioned?

Q. Yes.

A. That I did not talk to about future prices? Now your question is — did I talk to them all about future prices?

Q. Yes.

A. Yes, I have talked to them all about future prices.

Q. Which ones did you not agree with?

MR. GIAUQUE: Would you like the list in front of you?

A. No, this is all right. I recognize one in particular.

Q. Who was that?

A. One in particular that — to the best of my knowledge never gave me a firm commitment that they would move their

Q. Well, now, in light of all that testimony did you talk to Sam Olson on the telephone?

A. I could have. Evidently I did. Mr. Olson testified that I did.

Q. Do you have any present personal recollection of those telephone calls?

A. I do not, no.

MR. GIAUQUE: If the Court please. I examined the witness earlier about Exhibit 147 and I may have neglected to offer that.

THE COURT: It was not offered.

MR. GIAUQUE: We offer it at this time?

THE COURT: Any objection?

MR. MUNN: No, Your Honor, no objection.

THE COURT: Show Plaintiff's Exhibit 147 admitted without objection.

A. Now, Mr. Mason, during the period of time that Dea Entriken was working as your assistant, did Dea Entriken keep notebooks of his activities?

A. Not that I knew of.

Q. You knew of no telephone messages that he was retaining or notebooks he was retaining?

A. I knew of telephone messages that we each kept for our — I thought for a short period of time to refer back to and after a week I assumed they were destroyed.

I will overrule. I'll let him do it.

OPEN COURT

Q. Mrs. Rhoads, did you from time to time see Mr. Entriken make notes on the back of the phone messages?

A. Yes, I did.

Q. And after he made those notes, did you see the messages sit on his desk?

A. Yes.

Q. Did you from time to time see Dewey Mason making notes on the back of phone messages?

A. No.

Q. Did you see Dewey Mason taking notes on note pads?

A. Yes.

Q. Then after he made those notes, would you on occasion see the notes on his desk?

A. Yes.

Q. Would you be back near his desk area, say, more than one time a day on an average?

A. Several times a day.

Q. And did you ever see any notes on Mr. Mason's desk that contained language similar to that shown, for instance, on Plaintiff's Exhibit 33 where companies

were shown with a price and it said "will" with a certain price after it?

A. Yes, I saw that. It would be a list with a price and it was more like "will go", was the terminology.

Q. You saw notes in Mr. Mason's handwriting on his desk that said a certain company will go?

A. Yes.

Q. Did you see such notes on more than one occasion?

A. Yes.

Q. After the pricing section moved to Yale Avenue, would you describe the office situation there?

A. Mr. Entriken and Mr. Mason each had separate offices, and then all of the secretaries in the whole office were in one big room together.

Q. Was Miss Campbell also with Champlin at that time?

A. No, she wasn't.

Q. When the move was made to Yale Avenue were you involved in the central switchboard telephone in any way?

A. I think it was the last month that I was employed there, I was the receptionist for the entire office.

Q. Were you at least situated in such a way in that office before this one month that you could see the telephone switchboard?

A. No.

Q. Do you know whether the telephone switchboard was lit up at all times or not busy or —

A. It was busy. I didn't see it when I was sitting at my desk, but there was times you would walk in and out of the office and you could glance over at the telephone

Q. No, I understand that. But you knew that he had legal pads where he was keeping notes?

A. Oh, sure, that is what I said a moment ago.

Q. Now, did you maintain your notes while you were with Champlin? That is, did you maintain those notes in the regular course of your activities?

A. No. As I said, I would keep them for a week, maybe two weeks and pitch them, throw them away, there was no reason to keep them.

Q. What happened to your telephone directory?

A. The telephone directory, in about, oh, '73, somewhere in the vicinity of that, that thing got so gobbled up I couldn't read it so I threw it away.

Q. And what happened to all of your note pads, were they all thrown away?

A. By that time I didn't have any note pads except, oh, just daily scratch pads is all.

Q. Didn't you maintain your notes on legal pads, either legal size or the eight and a half by eleven and keep them in the top right-hand drawer of your desk?

A. I may have.

Q. And for how long a period of time may you have maintained those notes?

A. I would say a week or two weeks at the outside, three.

Q. Would those note pads have reflected some of the

Burgess in Atlanta. It was Glasgow, it was American.

Q. By the way Mr. Entriken, wouldn't your telephone records have been good evidence of the persons that you called, that is the formal American telephone company records?

A. Well, yes I would say so.

Q. How is it if you carted off documents when you left, how is it you didn't take those?

A. I wasn't —

MR. MUNN: Objection. Your Honor, counsel objected because he didn't like my use of the word carting.

MR. GIAUQUE: I think counsel is entirely correct.

THE COURT: I agree.

Q. How is it that you did not take with you your telephone bills from Champlin?

A. How is it?

Q. Yes.

A. Why is it, I don't understand.

Q. Where were they left?

A. I don't recall. I had no reason, no specific reason. Most of the things were put in the trunk of my car when we moved from Charles Page to South Yale. I didn't — I may have thrown them away. I threw away — I have

thrown away thousands of these pink slips we have seen.

Q. But when you left Champlin, had copies of all of your telephone records didn't they?

A. I'm quite sure they did. I would think that they would have.

Q. Have you ever seen them since?

A. No.

Q. Mr. Entriken, if you were trying to make a case on anybody, would you have taken those records with you?

A. Yes, I sure would have.

Q. The one page of your telephone record that I showed you, you didn't even take the one page, did you? That came out of Champlin's business file.

A. I don't know where that document came from. I don't know, I may have produced that. I don't — I don't recall.

Q. In any event you made no effort at the time you terminated with Champlin to take any of your telephone bills did you?

A. No.

Q. Then all of the telephone bills for yourself and Mr. Mason remained with Champlin did they not?

A. They were.

Q. They remained with Champlin Petroleum.

A. I presume so. I didn't take them.

Q. Would you look at P129.

A. They weren't given to me. As it happens on a monthly — as you saw the letter that I asked them for expenses on the

Q. Do you know what happened to any of the company's telephone records for this period of time, '70 to '73?

A. I have no idea.

Q. Did you ask someone else to destroy your particular notebooks or did you get rid of them?

A. No, I just throwed them in the waste basket.

Q. Now, you were involved, a substantial part of your time you indicated, on the telephone talking with competitors, correct?

A. That is true.

Q. Now, there are only possibly three records that would bear on your conversations, isn't that true? And that is your telephone directory, your notes of conversations, and the company's telephone records, correct?

A. Go over that list again, would you please, sir?

Q. There would only be three records that would reflect your activities on the phone. Your telephone directory?

A. Right.

Q. Your notes of conversations?

A. Right.

Q. And the company's telephone records, correct?

A. I believe that's right.

Q. And for the period of time involved in this suit all of those records have been destroyed, have they not?

MR. MUNN: I object to that, Your Honor, that

Q. Were there any Watts lines available?

A. Watts lines?

Q. Yes, sir.

A. Yes. We had at that time one Watts line which was called a Band 7 for use in the State of Oklahoma. We had another Watts line which gave us access to the surrounding states, states surrounding Oklahoma, which was called a Band 2.

Q. What employees in the region office had access to those Watts lines?

A. All the employees had access to the Watts lines.

Q. At some point in time did you make a recommendation as to the telephone system there on Charles Page Boulevard, some change to be made?

A. Yes, I did.

Q. Would you describe for the jury the changes that you recommended?

A. The call directory system gave every individual access to not only the Watts lines but the ability to dial direct long distance calls. In discussing this — and we weren't able to have any control on the amount of long distance calls that were made. In discussions with the telephone company they came up with a system called special billing numbers where each individual would have a special billing number and the outgoing long distance calls from the office would have to be charged

to that billing number. They could not be dialed direct. This special billing number could also be used when the people were away from the office to charge long distance calls to that billing number. We did this to alleviate some expense of where they had to formerly charge it to their home telephone number and apply for reimbursement on expense account.

Q. When an employee was in the office was he to use the Watts line for long distance calls or was he to use this special billing number?

A. He was to use the Watts line except in cases of emergency nature, or very important nature where it was necessary to go direct on long distance.

Q. And I take it that your recommendation was accepted and this system was utilized in the Tulsa region?

A. Yes, it was.

MR. HILL: I would ask the clerk to present you a copy of Plaintiffs' Exhibit 60.

Q. Mr. Richardson, after the special billing number system was employed there in the Tulsa office, how would the phone bills come out each month?

A. The phone bill, as it would be broken out and billed each individual special billing number, would be listed separately on a detachment to the phone bill.

Q. The top sheet of the bill would have the total amount

for that answer, Your Honor, move to strike.

THE COURT: I believe that's right, sustained.

Q. Did the phone company ever come out and try to cut your phone service off?

A. No.

Q. You have phone service during the whole period of time on Charles Page?

A. Yes, we did.

Q. In your experience, if you didn't pay the phone bill would they cut it off?

A. I can't speak for my experience because I always paid my phone bill, I understand that is the case.

Q. Do you know whether or not these phone bills were maintained as a record in Enid, other than what maybe I have told you or an attorney for Champlin has told you?

A. Other than what you told me, no, I have no idea what they did with them.

Q. You became regional operations manager in 1971. How long were you regional operations manager?

A. From January of 1971 to April of 1972. And in April of 1972 I was given the additional duty of acting regional manager of marketing.

Q. How long were you acting regional manager of marketing?

A. Until May 1, 1972, when I was given the position of regional manager of marketing.

Q. So, there wasn't an attorney-client relationship involved?

A. I don't know, I don't know what constitutes that. I mean, just an office visit constitute an attorney-client relationship, I don't know, I don't know.

Q. Anyway, what are you telling us, what happened as a result of that? Did anything happen?

A. I told him what we had done, not in, obviously not in as specific a manner as I have told this Court, because I was in his office for approximately one hour, maybe, so that couldn't have been done. But, I told him what we had done.

Q. And did you get any advice?

A. Yes.

Q. What was it, please?

A. Don't worry about it, just put all that behind you and go out and do the best that you can.

Q. And what did you do after that?

A. I left his office.

Q. And during that, during the period of time from that spring of '73 until the spring of '75, did you talk with anybody on the subject of your activities while you were with Champlin? I mean in any specific sense, did anybody —

A. No.

Q. — ask you questions about what you were doing?

you went up to see Mr. Munn you told him that one of the reasons your employment with Champlin was terminated was because your job had become obsolete. He read that. What did you mean by your job had become obsolete?

A. Well —

MR. MUNN: Your Honor, I object to the question. It's not a fa hful reproduction of what I asked.

THE COURT: I'm sorry, what did you say?

MR. MUNN: I said I object to the form of the question. It purports to state what I asked and it misstates it.

MR. GIAUQUE: Your Honor, I can rephrase it.

THE COURT: I think it should be rephrased. I don't recall what was said.

MR. GIAUQUE: I recall it was quoted out of the deposition but it doesn't matter.

Q. Mr. Entriken, did you when you went to see Mr. Munn after you had been terminated by Champlin say something to him about your job having become obsolete?

A. Yes.

Q. What did you mean by your job had become obsolete?

A. Well, I was — the job that I had, function I was performing was to restore markets. The price of gaso-

line, as of late 1972 and e- ly 1973, I think we all know the price of gasoline had been pretty high, the markets were stable.

Q. So they didn't need someone to do what?

A. They didn't need a price fixer. I would say that created obsolesence, obsolesence is created.

Q. Obsolesence in the price fixing business?

A. That's correct.

Q. Counsel asked you a series of questions about who, which of your superiors had authority to set prices, or sign off on various price changes. Did you yourself have any authority within Champlin that affected the prices which Champlin products were sold?

A. Yes.

Q. Tell me, tell the Court and Jury, please, how the authority that the job were performing affected the prices that Champlin products were sold.

A. The authority, we did not have the authority to charge or to change the price we were charging. We had the authority to do certain things which affected the price that would be charged. If we were supporting our customers, price support, a discount in a given market which was depressed below normal, 23.9, 25.9, we had six cents a gallon price support for him, whatever it may have been, then he, in effect, gets a discount from his buying price, 14 cents and some per gallon, so he's paying eight cents a gallon approximately or nine. Well, if we get the market up, back up to a full normal from that 23.9 to 36.9, 34.9, 35.9, that

MR. GIAUQUE: I don't intend to, Your Honor.

THE COURT: In the deposition.

MR. GIAUQUE: I don't intend to, I don't intend to go into other conversations.

MR. HILL: Are we going to go into other parts of the deposition?

MR. GIAUQUE: No, counsel, I am asking him to explain his answer to the deposition question.

MR. HILL: Okay.

(OPEN COURT)

Q. Mr. King, counsel on direct examination asked you whether in your deposition you had testified that you had no knowledge other than what you had heard from others about an alleged price fixing conspiracy in Oklahoma, Arkansas, and Texas, involving Champlin among others. You testified, if I understand correctly, that you did not. Now, in light of the conversations that you testified to here in court, how do you explain that answer?

A. The answer as asked, as I understood it, would be did I have the knowledge that Champlin took part in the price fixing with other companies. I answered truthfully on that as I understood the question, that no, I did not have that personal knowledge in Oklahoma, Texas, and Arkansas, which are the three areas specified.

Q. And at that time you had no knowledge whatever of

knowledge of price fix conspiracy be any different, Mr. King, if the question that was asked of you on your deposition had asked about Mack Wright and Bob Phillips and other competitors of Champlin?

A. Yes, it would have been different.

Q. Had those questions been asked would you fully and fairly explained those conversations as you have here in open court?

A. Yes, I would have.

MR. GIAUQUE: Thank you, that's all.

THE COURT: Mr. Hill?

RECROSS EXAMINATION

BY MR. HILL:

Q. Mr. King, I just have one question, if I may, if the Court doesn't mind I will ask him from here. Just so we are perfectly clear, Mr. King, you have no knowledge whatsoever either in 1977 or now about any involvement of Champlin Petrolcum Company in any alleged conspiracy in the States of Oklahoma, Arkansas and Texas, and the only information that you have knowledge of that you think has to do with some sort of conspiracy is the conversations that you have testified to this morning and yesterday afternoon with Phillips and others, is that right?

MR. GIAUQUE: Object to the form of that question, Your Honor. Counsel is merely arguing his theory

Q. Mr. Belanger, would you have knowledge of any facts relating to your company's allegations that Champlin Petroleum Company was somehow involved in ar alleged conspiracy to fix the retail price of gasoline in Texas, Oklahoma, and Arkansas, during the years 1970 to 1973?

A. I would have to answer that yes.

Q. When did you get that information?

A. Well, I was here all last week.

Q. Other than your just sitting in the courtroom and hearing, or overheard what somebody said from the witness stand, do you have any personal knowledge?

A. Other than what I heard last week in testimony? Other than that?

Q. I am talking about your personal knowledge that you acquired on your own outside of this courtroom or from hearing someone else talk?

A. No.

Q. Mr. Belanger, you testified in response to questions by Mr. Bendinger about numerous telephone conversations which you had with Carl King at the request of of various people, haven't you?

A. Yes.

Q. No one from Champlin ever requested you to call Carl King, did they?

A. Not that I am aware of.

THE COURT: I appreciate that.

MR. GIAUQUE: It's very brief, Your Honor.

THE COURT: Go ahead.

Q. Tell us what was said to you, please.

A. On one such occasion Mr. Mason had been talking to a representative of King, Sam Olson. When he hung up the phone I knew that there had been a problem during that conversation by the way that the telephone was hung up. But, he told me, mentioned that, remarked that King or Olson, I don't recall which name was used, was, that so and so King, or Olson, what is the problem, why. He said I have got this whole market up and he won't move. That is the substance, was the substance of that conversation as related to me. The market itself, being known as the Sands Springs line in Tulsa. Charles Page Boulevard, West 3rd Street, coming out of Tulsa into Sands Springs is where our office was located.

Q. And were you aware at the time that Mr. Mason had been working on trying to get the prices up?

A. Yes.

Q. Had he been calling competitors about this?

A. Yes.

Q. What happened along that street in the market place after this conversation?

A. That particular strip, market, which was somewhat isolated from the rest of the city, the prices that were up or had been arranged to go up, those stayed down and the prices that were up went back down.

Q. Did the market drop to the bottom?

A. Yes.

Q. Did Mr. Mason tell you he had advised King that if he didn't go up the market would drop back to the bottom?

MR. MUNN: That's leading.

THE COURT: It is a leading question.

Q. Did he say anything to you about what he told Mr. Olson?

A. Regarding that particular occasion, one such — this may have happened more than once — he told Mr. Olson, or King, whichever had been referred to, that this whole thing, being the market, would be right back down on him on the bottom if he didn't move.

Q. Is that what happened?

A. Yes.

Q. Now when did you first learn, Mr. Entriken, that anyone involved in this lawsuit was interested in either your testimony or your records?

A. In 1975.

Q. And who contacted you?

that you can — we could — we had one Watts line for the State of Oklahoma as I recall, one, possibly two, the State of Oklahoma only. We could call from the Tulsa office at any number within the State of Oklahoma. The line was free.

Q. And these were, in effect, ways of a company like Champlin or any other company paying long distance bills in advance or in a lump sum, rather than —

Q. Each call?

A. Yes, sir.

Q. This Watts Line wasn't unique to you, it was available to everybody in the Tulsa office, was it?

A. Yes. It was available, yes.

Q. Let me go back now to where we were yesterday talking about this meeting that you had in a hotel room with the King people. I believe you said you and Mr. Olson were meeting in your home originally talking about setting up at that meeting, is that correct?

A. Well, no, when we met in my home we didn't talk about setting up a meeting.

Q. What were you talking about in your home, you and Mr. Olson?

A. Well, he was interested in service station sites in Dallas. I understood this to be his reason for coming to Dallas. He also wanted to know if I would be willing to tell him what I had done while I worked for Champlin, when

a job, or come by and see me, well, if you're not doing anything, come by and see me and he was —

Q. When was it you believe Sam Olson contacted you in Dallas?

A. Early '75.

Q. Some two years after your termination?

A. I'd say approximately two years. It may have been in April. I recall it was warm in Dallas and it gets that way in March, April.

Q. During that approximate two year period did you have any occasion to go back and review any of these records for any reason?

A. Not at that — no no.

Q. All right. Now when Mr. Olson first came to see you, you were living in and employed in Dallas?

A. Yes.

Q. All right. Was Mr. Olson alone when he came to see you?

A. Yes.

Q. What did he say to you at that time?

A. He asked me if I would — well, he told me that he was in Dallas to I believe look at a particular service station in sight or something, his purpose in Dallas but anyway, plus the fact that he wanted to talk to me and he asked me if I would be willing to tell the truth about what I had done while

I was with Champlin and what Champlin did, what we did, how we operated.

Q. What did you say to him?

A. I said yes.

Q. Did you tell him — what did you tell him at that time?

A. I told him that I would do so, yes. I could see — I didn't think that this would cause me oh — why wouldn't I? Sure, I would be glad to. It's no —

Q. You had not been employed by Champlin for a period of two years in any capacity at that point, had you?

A. No.

Q. Were you mad or vindictive towards Champlin at that point?

A. No.

Q. If Mr. Olson hadn't come and asked if you would tell the truth about the matters, would you have done anything about it at all on your own?

A. No, I doubt it. I had.

Q. Pardon me?

A. I had.

Q. What had you done?

A. In the spring or summer of '73 after my termination, I was advised by two people, personal contacts, one of whom was with Champlin back in the days when Champlin was the

A. No.

Q. During that period of time I understand you made no use of these records?

A. No.

Q. All right. Now, Sam Olson contacts you and asks you if you will tell the truth, and what happened next?

A. Well, I told Sam yes at the time, and we were at my home, and I said yes, I'll tell you. I said you already know these things, why do you want me to tell it. I told Sam you already know what happened, why me, why do you want me to tell these things. I couldn't understand, I didn't understand, but we discussed various situations such as Consumers selling with him, and how Mack Wright was, you know, if he was still as aggressive, such as that Oklahoma City situation, and that — just what was going on in the areas in which he had marketed. And we had — areas we had talked about, general conversation, and one or two things came up during the conversation. I can't remember specifically what they were, but one or two specifics came up and Sam asked me, said something to the effect, "Really, did that happen?" I said sure, I have this on a — I have the whole — I have a documentary of this situation when Mack Wright, if it was that Oklahoma City situation, for instance, I remember that well. I remember that, Sam, I had that all — I have a documentary

I worked for Champlin.

Q. I believe you said —

A. Also we discussed various — old memories, I guess, the markets, what had happened, do you remember the Oklahoma City situation? Don't you remember this situation, it was a casual situation.

Q. Then what happened next after you and Mr. Olson's meeting in your home there in Dallas?

A. He called me at some later date. This is to the best of my recollection at this time. He called me at some later date and asked if I would give a statement regarding what I had done while I was with Champlin, what we had done, what everyone had done within the industry while I worked with Champlin.

Q. Did he tell you the purpose for which you were to give that statement?

A. No.

Q. Was that after you had shown him the Champlin records in the trunk of your car?

A. I had shown those when he came to my home in Richardson — pardon me, on the purpose?

Q. Yes.

A. He mentioned at this time, it is my recollection, that he mentioned that various lawsuits were being filed and his purpose — he may have mentioned his purpose that it was

Q. Did you do that?

A. Yes.

Q. And when was that, the late spring, you say?

A. Spring or summer of '73, prior to summer of '73, I would say.

Q. Did you still have these records in your possession?

A. Yes.

Q. And did you take the records with you when you went to see Mr. Munn?

A. I didn't make an effort to take them with me, they were in my car when I went over to Forth Worth, and I parked near his office after I located it, and they were in my car. As a matter of fact, I did have, I had that same briefcase, I may have had, possibly did have some of them with me, I don't know.

Q. And what were you doing to see Mr. Munn about?

A. Whether or not I could be subject to any, quote, legal entanglement, unquote, because of what I had done while I had worked with Champlin, for legal advice regarding that matter.

Q. And had you seen Mr. Munn for that purpose, that is, he had ever acted as counsel to you previous to that?

A. No, I had never met him, to the best of my knowledge. I may have when I was young, but to the best of my knowledge I never met him.

'73 and '75. I could have gone and gotten in touch with the Justice Department easily, but I didn't. When someone asked me if I will — I'm not going to say no because I'm evading the truth and that's getting close to saying that I didn't do these things as I did. I'm sorry for it. But I suppose I'm sorry for what has happened since, not because I haven't told the truth about the matter but these — it's very simple. These are the type things that should be known. I knew this at the time that I was doing it. I suppose we all did but we all had jobs and so naturally we protected our jobs. We did our jobs. If I still had that job it would be a tough proposition for me. If I still had that job I don't know what I'd do, but I didn't so it made it real easy for me. I'm glad I did it. I'm glad it was that way so I could tell the truth about the matter. I just — I'm glad that the truth can be known and that's what I wanted and had I handed over all of these documents and cleansed my mind of all of these activities through two years and a half, forgotten about them, to Champlin, in the form of — in the form of their lawyer, whom I went to see for legal advice, had I done that, then this would be a forgotten matter I think. I wouldn't have been involved, but I didn't. Just by chance it just happened that way so when the opportunity — it's the wrong word, not opportunity — it just happened that someone wanted to know the truth about this matter and I said yes, I'll tell the truth. That's it.

Petitioner's Reply Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHAMPLIN PETROLEUM COMPANY,
Petitioner,

v.

KING & KING ENTERPRISES, d/b/a KING GAS & OIL, and CARL R. KING, d/b/a KING GAS & OIL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

1. KING CONCEDES THAT THERE IS A SQUARE CONFLICT AMONG THE CIRCUITS

King does not dispute that there is a conflict between the Fifth Circuit on the one hand and the Ninth and Tenth Circuits on the other, on the issue of post-judgment interest on attorneys' fees awarded under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976). Br. Opp. at 29-30. The issue is one of federal statutory law. It is a simple issue. Resolution of the issue turns on whether an attorney's fee award under the Clayton Act is a "money judgment," on which interest is allowed under 28 U.S.C. § 1961 (1976),[1] or whether, in light of the express language of the Clayton Act, it is a "cost" which historically has been viewed as something other

[1] King mistakenly refers to 28 U.S.C. § 1981. Br. Opp. at 28-29.

than a "money judgment." The issue arises frequently in federal antitrust litigation. The law in the federal courts should be uniform throughout the nation. Only this court can make it so.[2]

2. THIS CASE INVOLVES A SEVENTH AMENDMENT ISSUE

King urges, *citing* Justice Frankfurter's *dissenting* opinion in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), and *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440 (1918), that the erroneous granting of a motion for a directed verdict, or the erroneous granting of judgment for a plaintiff as a matter of law on an issue arising in the course of a jury trial does not present a Seventh Amendment issue appropriate for review by writ of certiorari but simply involves an appraisal of "the fair inferences to be drawn from the evidence." Br. Opp. at 24. In the great majority of cases, this is true. It is not true here. As we pointed out in our Petition the trial judge "did *not* even attempt to justify his ruling on the ground that the undisputed facts established the fraudulent-concealment exception as a matter of law." Pet. at 17. Everything said by the trial judge in withdrawing the statute of limitations issue from the jury is included in our Petition at pages 13-14. All he said was: "It's not an issue in controversy, the Court shall rule that the Plaintiff has sustained its burden." Pet. at 14. He took the issue away from the jury by raw exercise of judicial power.

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[2] King characterizes the *Carpa* case as an aberration. Br. Opp. at 30; *Carpa, Inc.* v. *Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978). King cites cases in four other circuits awarding interest on attorneys' fees. Br. Opp. at 29. In only one of those circuits, the Ninth, was the Clayton Act, which expressly makes attorneys' fees an item of "costs," involved. Even a quick reading of the cases reveals that *Carpa* gives the issue the most thorough treatment, and is the most solidly reasoned.

This Court disposed of an argument identical to King's in *Baylis* v. *Travellers' Insurance Co.*, 113 U.S. 316 (1885):

> If . . . the court had directed a verdict for the defendant on the ground that the evidence . . . was insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, it would have followed a practice sanctioned by repeated decisions of this court . . . .
>
> * * * *
>
> . . . But, without a waiver of the right of trial by jury . . . the court errs if it substitutes itself for the jury, and . . . finds the facts involved in the issue, and renders judgment thereon.
>
> This is what was done in the present case. . . . The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury.
>
> In this particular, we think error has been well assigned.
>
> The right of trial by jury in the courts of the United States is expressly secured by the Seventh Article of Amendment to the Constitution. . . .

113 U.S. at 320-21.

3. UNDER THE SEVENTH AMENDMENT, THE ISSUE OF KING'S KNOWLEDGE OF THE CLAIMED CONSPIRACY WAS FOR THE JURY. THE RECORD AT EVERY STAGE OF THE PROCEEDINGS IS FULL OF PROOF THAT HE KNEW OF THE CLAIMED CONSPIRACY FROM ITS INCEPTION. NO COURT HAS YET EVEN REFERRED TO THE PROOF ON THIS ISSUE. UNTIL AND UNLESS SOME COURT HAS DONE SO, CHAMPLIN MAY NOT BE DENIED ITS JURY RIGHT

In Champlin's Petition and Appendix it set forth an avalanche of evidence—evidence King himself presented at trial—that King knew of the conspiracy he alleged from its inception. In response, King states that the evidence is "ambiguous,"[3] and says that "even assuming a conflict in the evidence on King's knowledge of the conspiracy"[4] the issue could properly be resolved by the judge and not the jury. He refers to this avalanche of evidence as "tidbits of testimony."[5] The testimony of King's employee Olson, quoted at page 8 of Champlin's Petition, that he learned through "telephone conversations with competitors" in "1969" that "the oil companies would get together and determine what price they would want to go and when they would want to go and then they would contact everybody and let everyone know"; and that in " '70 to '73" there was no "doubt in [his] mind" that Dea Entriken of Champlin "had been fixing prices" are not tidbits of testimony. They are central to King's theory of his case. In explaining this theory of the case to the Court of Appeals for the Tenth Circuit, King said *in his brief*:

> *. . . Champlin and its competitors initially tried to get King to cooperate; they talked about King's prices and told King that it would have to . . . price with*

---

[3] *See* Br. Opp. at 17.

[4] *See* Br. Opp. at 21, n.2.

[5] *See* Br. Opp. at 16.

> *Champlin and the other full-service branded independts.* Brief of Appellees at 24, *King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981) (emphasis supplied).
>
> • • • •
>
> Champlin and its co-conspirators tried to dictate King's selling price by telling King that it would have to . . . price with Champlin and the other full-service branded independents. *Id.* at 7.
>
> • • • •
>
> Champlin and its co-conspirators were constantly trying to dictate King's selling price by pressuring, threatening or injuring King . . . . Those collusive price fixing activities were successful and precluded King from selling at its optimum price. *Id.* at 22.
>
> • • • •
>
> . . . *Because King refused to join the price fixing conspiracy . . ., Champlin and its co-conspirators . . ., tried to pressure, threaten or injure King. Id.* at 24 (emphasis supplied).

It is impossible for "Champlin and its co-conspirators" to have asked King to join a price-fixing conspiracy and to have threatened him for refusing while at the same time concealing the conspiracy from him. King's current claim that he was ignorant until 1975 of the alleged conspiracy is refuted by the testimony of his witnesses, his lawyer's summation to the jury, his brief filed with the Tenth Circuit Court of Appeals, and his entire theory of the case.

The trial judge took the issue of King's knowledge of the conspiracy from the jury by raw exercise of judicial power. The Court of Appeals could not, consistent with King's own brief, have addressed the issue of his knowledge of the conspiracy and found in his favor as a matter of law. Although there are some enigmatic statements in its opinion, quoted by King at page 16 of his

Brief in Opposition, it is fair to say that the Court of Appeals affirmed by referring at length, as King does in his Brief in Opposition, to proof on one of the three statute-of-limitations issues—whether the conspiracy was "fraudulently concealed"—while referring to *no proof whatsoever* on the threshold issues of whether King knew or should have known of it. This Court should either reverse and remand for a jury trial on the statute of limitations issue; or, it should vacate the decision of the Court of Appeals and direct it expressly to consider the proof on the other two prongs of the statute of limitations issue: whether King knew or should have known of the claimed conspiracy over four years before he filed suit.

4. MISCELLANEOUS MISSTATEMENTS IN KING'S RESPONSE

King questions, Br. Opp. at 22, n. 4, the basis for Champlin's statement in its petition that Champlin has been formally notified that the trial judge has now "agreed to testify against" it in a malicious prosecution lawsuit brought against it by Dea Entriken. Pet. at 27. The statement in Champlin's Petition is based on a letter from Entriken's attorney, reproduced in Petitioner's Appendix, saying that Judge Seay has "been contacted and [has] consented to testify for Plaintiff in the malicious prosecution case." Pet. App. I at 202a.

In the Petition Champlin pointed out that the fraudulent-concealment exception to the statute of limitations arises frequently in federal antitrust cases—it has been referred to in over two hundred reported decisions set forth in the Petition. Pet. at 19-26. Champlin also pointed out that it is an issue on which plaintiff has the burden of proving a negative proposition regarding his own state of mind, and that we know of no case in which the issue has been resolved in *plaintiff's* favor as a matter of law, except this case. In its Brief in Opposition, King cites nine cases which purport to refute this prop-

osition.[6] The first six[7] deal with the question whether the issue may be decided in favor of the *defendant*, who has no burden of proof on the issue, as a matter of law. The other three, *Newman*, *Mt. Hood*, and *United States Steel*, do not even involve the "fraudulent concealment" exception[8] to the statute of limitations.

The facts remain that plaintiff has the burden of proof on the fraudulent-concealment exception to the statute of limitations; that he must thus introduce proof as to his own state of mind; and, that the exception has never before been found to have been established as a matter of law.

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[6] *Crummer Co.* v. *DuPont*, 255 F.2d 425 (5th Cir.), *cert. denied*, 358 U.S. 884 (1958) (Br. Opp. at 19, 21); *Picoult* v. *Ralston Purina Co.*, 1969 Trade Cas. ¶ 72,681 (S.D.N.Y. 1969) (Br. Opp. at 26); *Ohio* v. *Peterson, Lowry, Rall, Barber & Ross*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,880 (10th Cir. 1981) (withdrawn; April 24, 1981) (Br. Opp. at 27); *Arneil* v. *Ramsey*, 550 F.2d 774 (2d Cir. 1977) (Br. Opp. at 28); *Goldstandt* v. *Bear, Stearns & Co.*, 522 F.2d 1265 (7th Cir. 1975) (Br. Opp. at 28); *Gaudin* v. *KDI Corp.*, 576 F.2d 708 (6th Cir. 1978) (Br. Opp. at 28); *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559 (D. Minn. 1968) (Br. Opp. at 26); *Newman* v. *Prior*, 518 F.2d 97 (4th Cir. 1975) (Br. Opp. at 25-27); and, *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980) (Br. Opp. at 27).

[7] *Crummer, Picoult, Gaudin, Peterson, Arneil,* and *Goldstandt.*

[8] *Newman*, apparently arising under a federal statutory tolling provision applicable only to securities cases, does involve issues which are akin to the fraudulent concealment issues. However, contrary to Respondent's statement, Br. Opp. at 26, appellant in *Newman* did *not* argue that the trial court erred in failing to submit the issue to the jury. The only issue raised by appellant's brief was whether the applicable statute was two years or one. The brief in that case is included in the Reply Appendix.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be granted.

Respectfully submitted,

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December 22, 1981

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss
CITY OF WASHINGTON)

On behalf of Champlin Petroleum Company and pursuant to Supreme Court Rules 22.5, 28.3, and 28.5(c), I have caused three copies of this Reply Brief for Petitioner to be served by mail upon:

Richard W. Giauque
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counsel of record for King & King Enterprises, d/b/a King Gas & Oil, and Carl R. King, d/b/a King Gas & Oil, respondents. These documents were deposited in a United States mailbox, with first-class postage prepaid, this 22nd day of December, 1981.

All parties required to be served have been served.

JOHN W. TOOTHMAN
Attorney for Champlin Petroleum Company, Petitioner

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Subscribed and sworn to before me this 22nd day of December, 1981.

Notary Public

My Commission expires:

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Appeal No.: 7301571

DR. D. W. NEWMAN, *et al*,
Appellee,

vs.

FERRELL L. PRIOR,
Appellant.

APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ENTERED MAY —, 1973

BRIEF FOR APPELLANT

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INDEX AND AUTHORITIES

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Premier Industries, Inc. vs. Delaware Valley Financial Corp., (E. District of Pennsylvania) 185 F. Supp. 694

Shontas vs. Hiriman, (District Court of California) 28 F. Supp. 478

Sibbach vs. Wilson and Company, 312 U.S. 1, 85 L. ed. 479, 61 S. Ct. 422 (1940)

FIRST ISSUE:

Did the trial court err in permitting the Plaintiff to proceed in the manner and form permitted as a class action?

SECOND ISSUE:

Did the trial court err in construing the Statute of Limitations provisions raised by the Pleading?

THIRD ISSUE:

Did the trial court err in not requiring pleading the cause of action within the required period under the S. E. C. provisions?

FOURTH ISSUE:

Did the trial court err in instructions concerning damages?

FIFTH ISSUE:

Did the trial court err in permitting the action to proceed without parties' Plaintiff being named, both in the summons and in the order designating this action as a class action?

STATEMENT OF THE CASE

[2] This action arises from the sale of oil and gas interest in the counties around Alexandria, Virginia by the Defendant, Charles A. Allen and the corporation, Natural Energies, with the litigant Prior being connected therewith.

The initial pleadings in this action are predicated upon one individual representing the owners of working interest in a given well. That is, there were nine (9) wells drilled and the Plaintiff pleaded one owner from each well and designates in his pleadings that that owner

is the owner of a fractional interest in the given well and undertakes to make each well a class.

Then, the jurisdictional requirements are apparently undertaken by alleging that each well was sold to the class for Forty Two Thousand ($42,000.00) Dollars. This would seem to be an allegation whereby jurisdictional amount is sought to be achieved by alleging the $42,000.00 for each class, the class being the well owners in each instance, and there being a total of nine wells.

The reason that the foregoing jurisdictional amount is here mentioned is that the Complaint and Amended Complaint both allege that this action is brought pursuant to the Securities and Exchange Laws, specifically section 77V Title 15. Contrary to this pleading, however, during the trial when the issue of the Statute of Limitations was raised the Court seemed to rule that the action could proceed because of a Virginia law within which an action of fraud and deceit could proceed. It is thought that this Statute of Limitations has no application to this case because it is a case purely under the Securities Act and the Statute of Limitations is provided and will be herein later discussed in detail.

[3] By way of general review the following sequence of events giving rise to the plea of Statute of Limitations is detailed.

The first sale of a fractional interest in oil and gas well was alleged to have occurred January 28, 1970, and the last sale August 3, 1970. The suit was then filed April 17, 1972.

The Complaint designates one person as a representative of the owners of the working interest in each well and seems to allege that such person is acting as agent for the other owners.

By order entered October 15, 1972, the action was designated a class action August 28, 1972. This order

permitted other parties to be notified and gave those persons until October 1, 1972 to disclaim.

The Summons issued by which this action was commenced names no one as Plaintiff and names no one as Defendant. To the contrary, it contains nothing except the reference "See Complaint". This deficiency was pleaded as Prior's Defense No. 14. Curiously enough the amended Complaint —— not change this deficiency and when the class action was ordered no parties were added in any manner whatsoever.

LAW OF THE CASE

Rule 4B of the Federal Rules of Civil Procedure provides as follows:

> "The summons shall be signed by the Clerk, be under the seal of the Court, contain the name of the Court and the names of the parties, be directed to the Defendant, state the name and address of the Plaintiff's attorney, if any, otherwise the Plaintiff's address, and the time within which these rules require the Defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the Complaint."

[4] The Complaint itself to which reference is had in the Summons designates the parties Plaintiff and then asserts that each Plaintiff represents himself individually and represents all persons who have or have had interest in described wells, this apparently in an effort to describe the purported class represented. It would seem that a subsequent holder and owner of a fractional interest in oil and gas well would not fall in the same class as the individual who was an original owner of that security who purchase it from the well promoter.

The circumstances under which each owner of a fractional interest in the well designated as a class may or

may not be the same. One owner may, in fact, have received an interest as a gift either directly from the promoter or from a relative who purchased it on his behalf.

Rule 23 with reference to Class Actions provides as follows:

> "A. If persons constituting a class are so numerous as to make it impracticable to bring them all before the Cour[illegible] such of them, one or more as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> 1. Joint, or common, or secondary ————————.
> 2. Several and the object of the action is adjudication of claims which do or may affect specific property ———————————— Or,
> 3. Several, and there is a common question of law or fact affecting the several right and a common relief is sought".

In the instant case it should be noted that the Plaintiffs were and presumably some still are, the owners of fractional interest in oil and gas wells, each well constituting the class. The parties who, in fact, became Plaintiffs by being named in the caption of the Complaint, *but not the Summons*, therefore, the class question goes to the Plaintiffs who are seeking a common right not against property.

[5] Again observe that no additional names of Plaintiffs were added at any time.

It would seem that this class action is what has been defined as a spurious class action in as much as it seeks only to assert rights common to Plaintiffs. That is there is a common question of law and or fact affecting the

several rights and the purport to obtain common relief, that is damages. This would seem to be the perfect example of the permissive joinder situation. It has been held that this type of class action is one where common questions of law or facts affect several rights and is merely a device of permissive joinder of Plaintiffs, which does not grant authority to adjudicate finally rights as to non-appearing parties or to confer any additional substantive rights upon Plaintiffs suing (California Apparel Creations vs. Weeder of California CCA 2nd 1947, 162F 2nd 893).

Again curiously, the Court in it's order of October 1, 1972, first found the class is so numerous that joinder of all its members is impracticable. This seems to be totally erroneous in that it would seem that what must occur is that there should be a finding that the members of the class are excessive numerous. Immediately following this recitation, the Plaintiffs are ordered to give written notice to members of the proposed class by first class mail at their known address, etc. How can it be that the members of a class are so numerous yet the Plaintiff can give them written notice in accordance with their last known addresses? Apparently what was intended was to make a class action from the owners of each well thereby creating eight (8) different classes with one member of each class a designated Plaintiff in the Complaint only. The record is silent as to whether or not these notices to members of the proposed class [6] were accomplished. Further, the class action order required that any amendment of the Plaintiff's Complaint be the subject of notice to the same persons.

The foregoing matters seem to have importance and significance in view of the following discussions concerning the Statute of Limitations. It would seem appropriate here to point out that the Defendant promoters drilled eight (8) wells at different times and that the offering sheets were made at different times and the

owners who purchased fractional interest purchased at different times which time span extended over only a few months.

Title 15 Section 77v provides for the jurisdiction of the United States District Court in civil action to enforce liability created by Section 77a through 77aa. This jurisdiction is limited to actions brought under the Securities and Exchange Act and requires no diversity of citizenship or jurisdictional amount but does confine the action to liability created by the Security and Exchange Act.

Title 15 Section 77k provides for the civil liability concerning the false registrations statement with reference to actions of commission and omission. This section limits the amount of recovery to the price which the security was offered to the public.

Again Section 771 of the same title limits the amount of recovery to the amount paid for the security less income received upon the tender of such security. (This section refers to communications including transportation and interstate commerce and the like.)

Section 77q of the same act recites fraudulent interstate transactions but makes no provision for recovery of damages in civil action.

[7] The same act at Section 77m provides as follows:

> "77m. Limitations of actions.—No action shall be maintained to enforce any liability created under section 11 [Sect. 77k of this title] or section 12 (2) [Sect. 77k (2) of this title] unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1) [Sect. 771 (1) of this

> title], unless brought within one year after the violation upon which it is based. In no event shall an such action be brought to enforce a liability or section 12 (1) [Sect. 771 (1) of this title] more than three years after the security was bona fide offered to the public, or under section 12 (2) [Sect. 771 (2) of this title] more than three years after the sale. (May 27, 1933, c. 38, Title I, Sect. 13, 48 Stat. 84; June 6, 1934, c. 404, Title II, Sect. 207, 48 Stat. 908.)

Observe that the Statute which creates the cause of action as a right also has the Statute of Limitations requirement which requires that the action be brought within specified period and requires additional pleading with reference to this matter.

The Statute of Limitations applicable, has been subject to several opinions and the following cases were cited and these cases were ignored by the trial court:

Newberg vs. American Dryer 195 F. Supp. 345.

The Eastern District Court of Pennsylvania held that Plaintiffs must allege that the stock was purchased herein, one (1) year of commencement of the action (Syllabus 9).

The Court's opinion recited that *it is* necessary to plead compliance with Sect. 13, the limitations provision of the Act. (15 USCA Sect. 77n). The opinion recites at page 352 that compliance with limitations of the foregoing Section is an essential ingredient of a private action and must be affirmatively asserted.

It is enunciated in many cases that compliance with the Statute of Limitations must be affirmatively pleaded and this was not done in this action.

[8] The following cases are authority for the foregoing propositions of law:

Premier Industries, Inc. vs. Delaware Valley Financial Corp. (E. District of Pennsylvania) 185 F. Supp. 694.

Osborne vs. Mallory (District Court of New York) 86 F. Supp. 869.

Fischman vs. Raytheon Mfg. Co. (District Court of New York) 9 F.RD. 707 (reversed on other grounds 188 F2nd 783).

Shontas vs. Hirliman (District Court of California) 28 F. Supp. 478

SEE ALSO—New York case reported at 298 N. Y. 2nd page 612 and Hopkins case 422 F2nd Syllabus 6 and 12.

Essentially, the Courts have construed the language of the Statute including section as substantial rather than procedural and it is a necessity for setting forth the essential ingredient of a private action.

The cases herein cited hold that a failure to plead facts in conformity with limitations section is vital to any claim based upon Section 77k or 77l.

The trial court rationalized that the limitation was not essential because the Virginia Act provided a sufficient cause of action for refusal to apply the limitation. This seems clearly erroneous inasmuch as jurisdiction was acquired only under the Securities Act.

Again, observe there is no allegation of diversity and no allegation of jurisdictional amount at which permitted this action to proceed by and under state law.

PUNATIVE DAMAGES

[9] Again the Court instructed upon the subject of punative damages and these damages were awarded and the Court then set aside this award.

The punative damage instruction was contrary to provisions of Securities Act and such instructions were clearly prejudicial to all Defendants.

Section 77k Title 15 Subsection G states, "In no case shall the amount recoverable under this section exceed the price for which the security was offered to the public".

The Court's instruction in which the jury was told that punative damages might be awarded is prejudicial in that it is contrary to law because the Securities Act makes no provision for these damages.

ARGUMENTS

The purported compliance with Rule 4 which rule requires that the Summons contain the names of the Plaintiffs and names of the Defendants is insufficient. The only effort to comply with the requirements of Rule 4 was to insert under Plaintiffs, "See Complaint", and under Defendants, "See Complaint".

The Complaint then undertakes, in the caption, to designate individuals as representatives of others and as Plaintiff in their own right.

Rule 4 unequivocally requires that the Plaintiffs and Defendants be named. This is a mandatory requirement inasmuch as it is the official commencement of the action. This rule has been ignored in this case.

[10] The case of Sibbach vs. Wilson and Company 312 US 1, 85 L. ed 479, 61 S. Ct. 422 is cited for proposition that Federal Court may not ignore the rules and that the rules have force and effect of which is submitted that there must be compliance with rules.

The order entered designated this action as a class action must certainly be supported by a properly issued Summons.

It is respectively submitted that the cause of action pursuant to the Securities and Exchange Act is substantive and that the Complaint must allege compliance with the Statute of Limitations contained in the Act.

The absence of allegations of diversity of citizenship and statutory amount precludes employment of the Virginia Statute to comply with the necessary time requirement.

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